

**2006**

**ANNUAL REPORT**

**of the**

**WESTERN STATES WATER COUNCIL**

**41st Annual Report**

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# 2006 ANNUAL REPORT

OF THE

## WESTERN STATES WATER COUNCIL

### INTRODUCTION

The first official meeting of the Western States Water Council was held on the south shore of Lake Tahoe, at Stateline, Nevada on August 3, 1965. The Western Governors' Conference approved the creation of the Western States Water Council during meetings in Portland, Oregon on June 10-13, 1965. The Governors' resolution explicitly stated: "The future growth and prosperity of the western states depend upon the availability of adequate quantities of water of suitable quality." Further, the governors felt that a fair appraisal of future water needs, and the most equitable means of meeting such needs, demanded a regional effort. Water availability and interbasin transfers of water were important issues. Western states found themselves in an era of rapid federal water resources development, and regional or basinwide planning, without a sufficient voice in the use of their water resources. The Western States Water Council has since provided a unified voice on behalf of western governors on water policy issues.

The emphasis and focus of the Western States Water Council has changed over the years as different water policy problems have evolved. However, the commitment towards reaching a regional consensus on issues of mutual concern has continued. The Council has proven to be a dynamic, flexible institution providing a forum for the free discussion and consideration of many water policies that are vital to the future welfare of the West. As envisioned by the Western Governors' Conference, it has succeeded as a continuing body, serving the governors in an expert advisory capacity. Over the years, the Western States Water Council has sought to develop a regional consensus on westwide water policy and planning issues, particularly federal initiatives. The Council strives to protect western states' interests in water, while at the same time serving to coordinate and facilitate efforts to improve western water management.

Council membership and associate membership status is determined based on a request from the governor. Originally, Council membership consisted of eleven western states: **ARIZONA, CALIFORNIA, COLORADO, IDAHO, MONTANA, NEVADA, NEW MEXICO, OREGON, UTAH, WASHINGTON and WYOMING**. In 1978, **TEXAS** was admitted to membership, after many years of participation in Council activities in an "observer" status. **ALASKA** requested and received membership in 1984. **NORTH DAKOTA** and **SOUTH DAKOTA** both received membership in 1988 after a long association with the Council. **HAWAII** was a member from 1991-1999. In 1999, **OKLAHOMA** requested and received membership. In 2000, both **KANSAS** and **NEBRASKA** joined the Council at the request of their respective governors. Council membership is automatically open to all member states of the Western Governors' Association. Other states may be admitted by a unanimous vote of the member states.

Associate membership has also been granted states exploring the benefits of membership,

experiencing financial hardship, or otherwise temporarily unable to maintain full membership.

Each member state's governor is an ex-officio Western States Water Council member. The governor may appoint up to three Council members or representatives, and as many alternate members as deemed necessary. They serve at the governor's pleasure. (Associate member states are limited to two representatives and two alternates.)

Council officers, including the Chair, Vice-Chair, and Secretary-Treasurer, are elected annually from the membership. State representatives are appointed to working committees, with one representative per state also appointed to an Executive Committee. The Executive Committee attends to internal Council matters with the assistance of a Management Subcommittee, which includes the Council officers, immediate past Chair, and Executive Director. The Council's working committees are the Legal Committee, the Water Quality Committee, and the Water Resources Committee. Each working committee is directed by a committee chair and vice-chair. Committee chairs, in turn, name special subcommittees and designate subcommittee chairs to study issues of particular concern.

Meetings of the Council are held on a regular basis, rotating among the member states, with state representatives hosting Council members and guests. In 2006, meetings were held in: Washington, D.C. on March 26-29th; Breckenridge, Colorado, on July 19-21st; and Sheridan, Wyoming on October 4-6th. Guest speakers are scheduled according to the relevant subjects to be considered at each meeting. The Council meetings are open to the public. Information regarding future meeting locations and agenda items can be obtained by contacting the Council's office. Included herein are reports on each of the Council meetings, positions and resolutions adopted by the Council, and a discussion of other important activities and events, related to western water resources. Other information about the Council and Council members is also included.

The Council relies almost exclusively on state dues for funding the organization. The dues for FY2006 (ending June 30, 2006) were set at \$25,000 per state. They have remained at this level for some years now. A copy of the audit performed for the fiscal year ending June 30, 2006 can be obtained from the Council office. The auditors noted "no matters involving the internal control over financial reporting and its operation that we consider to be a material weaknesses," and "no instances of non-compliance that are required to be reported herein under *Government Auditing Standards*."

During 2006, the Council staff was comprised of: D. Craig Bell, Executive Director; Anthony G. (Tony) Willardson, Deputy Director; and a secretarial staff consisting of Cheryl Redding, and Julie Groat.

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Hal Simpson - Colorado  
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David L. Pope - Kansas  
Ann Bleed - Nebraska  
Michael Linder - Nebraska  
(Alternate)\*  
Roland Westergard - Nevada  
Allen Biaggi - Nevada  
(Alternate)\*  
William Hume - New Mexico  
John D'Antonio - New Mexico  
(Alternate)\*  
Ron Curry - New Mexico  
(Alternate)\*  
Dale Frink - North Dakota  
Miles Tolbert - Oklahoma  
Duane A. Smith - Oklahoma  
(Chair) (Alternate)\*  
Phil Ward - Oregon  
Garland Erbele  
(Vice-Chair)  
Steve Pirmer - South Dakota  
Thomas Weir Labatt - Texas  
Dennis Strong - Utah  
Jay Manning - Washington  
Patrick T. Tyrrell - Wyoming

## Management Subcommittee

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Garland Erbele - South Dakota  
(Vice-Chair)  
Weir Labatt - Texas  
(Secretary/Treasurer)  
Hal Simpson - Colorado  
(Past Chair)  
D. Craig Bell  
(Executive Director)

\*For purposes of Committee rosters, the designation as "alternate" may not necessarily reflect the person's status regarding Council membership, but rather the person's function on the Committee.

## Farm Bill Subcommittee

Jeanine Jones - (Chair) - California  
Paul Frohardt - Colorado  
Adrian Polansky - Kansas  
David Glatt - North Dakota  
Phil Ward - Oregon  
Walt Baker - Utah  
Stephen Bernath - Washington  
Sue Lowry - Wyoming

## Endangered Species Act Subcommittee

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Tim Hall - Montana  
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James Davenport - Nevada  
Eileen Grevey Hillson - New Mexico  
Phil Ward - Oregon  
Weir Labatt - Texas  
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Sue Lowry - Wyoming

## Western Water Supply Challenges Subcommittee

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Karl Dreher - Idaho  
Norm Semanko - Idaho  
David Pope - Kansas  
Mike Volesky - Montana  
Ann Bleed - Nebraska  
Tracy Taylor - Nevada  
Jim Davenport - Nevada  
John D'Antonio - New Mexico  
Eileen Grevey Hillson - New Mexico  
Duane Smith - Oklahoma  
Garland Erbele - South Dakota  
Dennis Strong - Utah  
Pat Tyrrell - Wyoming

## WSWC Water Policy Seminar Subcommittee

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Richard Opper - Montana  
Roland Westergard - Nevada

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William Staudenmaier - Arizona

(Chair)

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Karl Dreher - Idaho  
Adrian Polansky - Kansas  
Susan Cottingham - Montana  
Tim Hall - Montana

(Alternate)\*

Candace West - Montana

(Alternate)\*

Pam Andersen - Nebraska  
Roland Westergard - Nevada  
Jim Davenport - Nevada

(Alternate)\*

Maria O'Brien - New Mexico

(Vice-Chair)

Chuck DuMars - New Mexico

(Alternate)\*

John Utton - New Mexico

(Alternate)\*

Matthew Sagsveen - North Dakota

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John Guhin - South Dakota

J.E. (Buster) Brown - Texas

Fred N. Pfeiffer - Texas

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Norman K. Johnson - Utah

Barbara Markham - Washington

Peter Michael - Wyoming

## **Legal Education Subcommittee**

Candace West - Montana

Norman Johnson - Utah

## **Amicus Brief Subcommittee**

Candace West - Montana

Jim Davenport - Nevada

John Guhin - South Dakota

Norman Johnson - Utah

## **Federal Reserved Water Rights Subcommittee**

Christopher Estes - Alaska

Susan Cottingham - Montana

Norman Johnson - Utah

## **General Adjudication Fees Subcommittee**

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Tim Hall - Montana

Roland Westergard - Nevada

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Joe Stohr - Washington  
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### **Border Water Issues Subcommittee**

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Karl Dreher - Idaho  
Dale Frink - North Dakota  
Herman Settemeyer - Texas  
Ken Slattery - Washington

### **Drought/Flooding Issues Subcommittee**

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Jeanine Jones - California  
Ann Bleed - Nebraska  
John D'Antonio - New Mexico  
Duane Smith - Oklahoma  
Dennis Strong - Utah  
Kurt Unger - Washington

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Hal Simpson - Colorado              Weir Labatt - Texas  
Dean Couch - Oklahoma              Sue Lowry - Wyoming  
Duane Smith - Oklahoma              Pat Tyrrell - Wyoming

## **Water Information Management and Data Collection Subcommittee**

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Hal Simpson - Colorado              Barry Norris - Oregon  
Hal Anderson - Idaho              Barney Austin - Texas  
Karl Dreher - Idaho              Dennis Strong - Utah  
David Pope - Kansas              Sue Lowry - Wyoming  
Estevan Lopez - New Mexico

## **Water Resources Management and Program Funding Subcommittee**

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Hal Simpson - Colorado              Kevin Ward - Texas  
Norm Semanko - Idaho              Dennis Strong - Utah  
Adrian Polansky - Kansas  
Mike Volesky - Montana  
Eileen Grevey Hillson - New Mexico

## **Water Transfers and the Public Interest**

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Tom Stiles - Kansas              Weir Labatt - Texas  
Tim Hall - Montana              Pat Tyrrell - Wyoming  
Jim Davenport - Nevada

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Jeanine Jones - California              Ann Watkins - New Mexico  
Lester Snow - California              Kevin Ward - Texas  
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Tom Stiles - Kansas  
Chris Levine - Montana  
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Richard Opper - Montana  
Walt Baker - Utah  
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### **Good Samaritan Subcommittee**

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Bill Hume - New Mexico

### **Quality-Quantity Interrelationship Subcommittee**

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### **Section 518/Tribes as States Subcommittee**

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## COUNCIL MEETINGS

### 150<sup>th</sup> Council Meetings - Washington, D.C March 26-29, 2006

The Council's 150th meetings were held at the Holiday Inn Capitol on March 26-29, in Washington, D.C. On March 27, the Council sponsored a workshop on Water Needs and Strategies for a Sustainable Future with nearly 100 stakeholders, including federal and state agency officials, tribal representatives, congressional staff and many non-governmental organizations. The purpose of the workshop was to gather comments on a draft report prepared by the Council for review and adoption by the Western Governors' Association (WGA) at their next annual meeting in June 2006. The final report is available on the WGA's website: [www.westgov.org](http://www.westgov.org).

The Council meeting on March 29 included special guests: Mark Limbaugh, Assistant Secretary of Interior for Water and Science; Steve Stockton, Deputy Director, Civil Works, U.S. Army Corps of Engineers; and John Keys, U.S. Bureau of Reclamation (BOR). Mark addressed a number of issues including the Endangered Species Act (ESA), Colorado River Basin shortage criteria, aging infrastructure needs, U.S. Geological Survey (USGS) streamgaging, a federal geospatial one-stop portal, and BOR's "Managing for Excellence" review in light of a National Academy of Science (NAS) study on BOR management. With respect to a suggested ESA protocol to improve federal/state coordination, he is committed to working with the Council. Steve Stockton noted the Council's "impressive" work plan, and stressed the importance of controlling the nation's hydrograph - drought and floods - to ensure social and economic stability. He emphasized current federal budget constraints, and the need for new partnerships. The Corps also has a strategic plan to address changing water needs and its current backlog of authorized projects. He briefly mentioned the new Water Resources Development Act (WRDA), and proposed Corps planning reforms. WRDA passed the House, but not the Senate.

John Keys announced his retirement, effective April 14, after nearly 40 years of service. The Council honored him with a special resolution of appreciation. He also discussed the NAS study, Managing Construction and Infrastructure in the 21<sup>st</sup> Century Bureau of Reclamation, which has led to the identification of 41 tasks for implementation. He asked for the Council's participation. He shared BOR budget figures for numerous projects and programs.<sup>2</sup> He expressed support for S. 895 to provide new authority related to rural water development, especially Title II federal loan guarantees. Drought response authorities are limited by the expiration of Title I of the Emergency Drought Relief Act of 1991, though Title II planning assistance remains available. The Senate has passed an extension of Title I authorities, but the House has yet to follow. He also said BOR is committed to work with the Council and Natural Resources Conservation Service (NRCS) under the "Bridging-the-Headgate" agreement.

The Council readopted three sunseting positions: (1) calling for a true state-federal partnership in protecting ground water quality; (2) urging "the Administration to support its stated policy in favor of Indian land and water settlements with a strong fiscal commitment for meaningful federal contributions to these settlements that recognizes the trust obligations of the United States..." and (3) recognizing the states' mandatory conditioning authority under Clean Water Act § 401 and Congress' longstanding deference to the states with regard to the allocation of water for all uses, including hydropower, while supporting streamlined federal hydropower licensing and integrated

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<sup>2</sup>*Western States Water*, Issue #1659, March 3, 2006

environmental review requirements. The Council also approved a letter commending EPA on establishment of a Tribal Water Program Council.

The Legal Committee met on March 27, and Mark Sudol, Corps' Regulatory Programs Chief, addressed the group on Clean Water Act (CWA) § 404 issues, including language to be published in the *Federal Register* on a watershed approach to mitigation banking and jurisdictional exemptions for maintenance of agricultural ditches, as well as canal lining and piping, most levee work, etc. He also noted cases pending before the Supreme Court which would clarify Corps jurisdiction over wetlands. He also referred to the March 2007 expiration of existing national-wide permits and efforts to establish new rules coordinated by the Council on Environmental Quality (CEQ).

There followed a panel discussion involving Matt McKeown, Principal Deputy, Environmental and Natural Resources Division, U.S. Department of Justice, and David Tenny, Deputy Undersecretary for Natural Resources & Environment, U.S. Department of Agriculture (USDA), Office of the General Counsel, regarding ways to expedite general adjudications in the West. They responded to specific suggestions contained in a Council letter, and previously adopted positions.

The Water Resources Committee began with a presentation by Jon Werner, Director, National Water and Climate Center, who described the functions of the Center, which measures snowpacks and provides forecasts on water supply for the Nation.

Bob Hirsch, U.S. Geological Survey (USGS) Associate Director, and Glenn Patterson, National Coordinator for the Cooperative Water Program, described FY2007 funding for the streamgaging network. Bob reported that the budget reflected a 20% increase for streamgaging, after years of flat budgets, which had resulted in the loss of gages due to inflationary costs. He noted that the increase was for the National Streamflow Information Program (NSIP) and not the Cooperative Water Program (CWP), where the budget remains essentially level. Therefore, a number of streamgages are expected to be lost largely because cooperators will have to drop out due to the increasing costs. Further, \$2 million was cut from cooperative studies.

Next, the Committee heard from two speakers on the status of the Bureau of Reclamation's infrastructure needs. Tom Donnelly, Executive Director of the National Water Resources Association (NWRA), described his organization's efforts in trying to get ahead of the issue of aging infrastructure. NWRA is conducting a survey to evaluate the extent of the need. Bill Rinne, BOR Deputy Commissioner, described a recent Reclamation initiative "Managing for Excellence."

Kevin Craig, Corps of Engineers Team Leader, next described various activities of the Corps, including restoring and modernizing infrastructure and responding to disasters, particularly flood events. Besides flood control, the Corps has a responsibility for water supply for both municipal and industrial uses, as well as recreation. He noted that money had been appropriated to fund watershed planning initiatives by the Corps. One proposal for use of these funds involved support for the WSWC action plan, approved by the Western Governors' Association last December.

The Committee next heard from Mark Rey, USDA, Undersecretary for Natural Resources and Environment. He indicated that the 2002 Farm Bill will expire in 2007. Secretary Mike Johanns initiated a series of listening sessions about what the new Farm Bill should include. A number of background papers summarize major issues. These in turn will be used as a mechanism to determine what the next Farm Bill should contain.

Jack Stults, Administrator, Montana Department of Natural Resources and Conservation, said that the prospects for a National Drought Preparedness Act were not promising, but that part of the bill, the National Integrated Drought Information System (NIDIS) may be pulled out and authorized separately by the Congress.

Karl Dreher, Director, Idaho Water Resources Department, and Gene Whitney of the White House Office of Science & Technology Policy (OSTP) next discussed the value of Landsat data, and the prospects that such data could be lost. There seems to be a high probability that the satellite currently providing such data will fail prior to the time the next such satellite is launched. Further, the thermal band in the next satellite is only identified as an option.

The Water Quality Committee began their meeting with a discussion with representatives of EPA's Office of Water, headed by Brent Fewell, Deputy Assistant Administrator for Water. Mr. Fewell discussed several areas of interest, including the integration of water quantity and quality management, the status of Section 518, which allows Indian Tribes to be treated as states for purposes of delegation of Clean Water Act (CWA) programs, Good Samaritan cleanup initiatives, the 9th Circuit's decision invalidating the Environmental Protection Agency's (EPA) delegation of authority to Arizona, standards for effluent dependent waters, and various funding issues. He saw EPA's role relative to water quantity as one of good stewardship, noting as an example the new rule on wetlands mitigation. He noted the agency's position that water transfers do not require an National Pollutant Discharge Elimination Systems (NPDES) permit. Brent saw the outlook for Good Samaritan legislation as favorable. EPA hopes the 9th Circuit's delegation decision will be reversed.

Following the discussion with the EPA representatives, the Committee heard from a panel of Congressional committee staff from the House Subcommittee on Water Resources and the Environment, and the Senate Environment and Public Works Committee. Among other things, they discussed the substantial proposed cuts in funding for the State Revolving Fund (SRF) program, and other programs, and the outlook for passage of a Good Samaritan bill.

Robbi Savage, Executive Director of the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA), spoke to the committee on a number of issues for the last time, as she is stepping down from her position after 30 years. Members thanked her for her many contributions. As a final matter, the committee discussed a draft letter relating to the National Tribal Environmental Council. Revisions were made and it was recommended for Council consideration.

### **151<sup>st</sup> Council Meetings - Breckenridge, Colorado July 19-21, 2006**

The Council's 151<sup>st</sup> meetings were hosted by the State of Colorado in Breckenridge on July 19-21, at the Beaver Run Resort. A letter from Dirk Kempthorne, former Governor of Idaho and a former U.S. Senator, expressed his greetings and best wishes. He declared, "I know well from my previous work on water issues in the West that the Council brings a sound perspective to policy development in these very important matters. I look forward to further collaborating with the Council in my new position as Secretary of Interior."

Hal Simpson, Colorado State Engineer, was primarily responsible for meeting planning, which included an informative tour that covered dredge and hard rock mining reclamation along the Blue River and interbasin water development and transfers bringing West Slope water under the Continental Divide to the cities along the Front Range. Members saw complex water collection systems of reservoirs, canals, pumps and pipelines, including Lake Dillion, Windy Gap Reservoir, Lake Granby, Shadow Mountain Lake and Grand Lake.

Hal was also recognized for his work over the past two years as WSWC Chairman, with the presentation of an engraved gavel. The Council unanimously elected Duane A. Smith, Executive Director of the Oklahoma Water Resources Board as its new Chairman, with Garland Erbele, South Dakota's State Engineer as Vice-Chair, and Weir Labatt, a member of the Texas Water Development Board, as Secretary-Treasurer.

The meetings began with an informal discussion of water needs and federal water programs that included representatives of the U.S. Army Corps of Engineers, U.S. Department of Agriculture's Farm Services Agency (FSA) and Natural Resources Conservation Service (NRCS), U.S. Geological Survey and Bureau of Reclamation. The focus of the discussion was the Western Governors' Association's 2006 report, *Water Needs and Strategies for a Sustainable Future*, prepared by the Council. The group also discussed the Corps' Western Watersheds Study and Reclamation's Managing for Excellence effort, as well as USDA farm conservation programs, particularly the use of FSA's Conservation Reserve Enhancement Program (CREP) and NRCS's Environmental Quality Incentives Program (EQIP) to promote sustainable agricultural water use and mitigate supply shortages. USGS streamgaging programs were also mentioned. The Council will be preparing a scope of work, prioritizing tasks and working to involve other stakeholders in implementation of the 28 recommendations in the WGA report.

The Council's standing committees also met and discussed integrating their work plans to include the WGA report recommendations, as well as many other topics. The Water Quality and Water Resources Committees met jointly to discuss developments related to requiring (a 2<sup>nd</sup> Circuit Court decision) or not requiring (EPA rulemaking) NPDES permits for water transfers.<sup>3</sup> The Council later adopted a revised resolution generally supporting EPA's interpretation of the law, while also supporting the "use by a State of available authorities to protect the water quality of the receiving water body in a water transfer."

The Water Quality Committee also discussed Good Samaritan legislation, which the Council and western governors have long supported to limit the liability of groups interested in reclamation of abandoned mines in the West. A bill (S. 2780) was introduced in the Senate with the Administration's support and was referred to the Environment and Public Works Committee. An identical bill (H.R. 5404) has been introduced in the House and jointly referred to the Transportation and Infrastructure Committee, and the Energy and Commerce Committee. Roger Gorke, EPA Office of Water, discussed a new Tribal Water Quality Council and Section 106 funding. Paul Frohardt led a group discussion on effluent dependent or dominated waters. There was also a roundtable discussion of current water quality priorities in each state.

The Water Resources Committee recommended and the Council later approved three revised position statements: one in the form of a letter in support of legislation specifically authorizing creation of a National Integrated Drought Information System (NIDIS); a second resolution reiterating the Council's support for enactment of a National Drought Preparedness Act; and a revised position statement in support of the Bureau of Reclamation's Water Conservation Field Services Program, as well as implementation of the Bridging-the-Headgate Partnership, which includes both the Council and Reclamation. The Committee meeting also included two panels, one discussing Farm Bill conservation programs and their use to improve western water management, and a second on federal water resources related information programs (USGS streamgaging, NRCS snow surveys and water supply forecasting, USGS/NASA Landsat thermal data used to estimate evapotranspiration and monitor water use in the West, and federal-state climate science

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<sup>3</sup>*Western States Water*, Issue #1672, June 2, 2006 and Issue #1673, June 9, 2006

partnerships). The Committee approved a letter reiterating Council support for Landsat thermal monitoring. The Corps presented information on its portfolio of water programs, and its Western Watershed Study was discussed further. Other topics included weather modification, rural water needs, water conservation, federal water infrastructure loan guarantees and pending legislation.

The Legal Committee had no items for Council action, but reviewed the U.S. Supreme Court's decision in the *Rapanos and Carabell* cases related to the Clean Water Act and wetlands protections. Other topics included: the current status of State water export laws, and the future of Indian water rights settlements (with Jennifer Gimbel, Chair of the U.S. Department of Interior's Working Group). The Committee also considered draft work products by WSWC interns on legal considerations related to water conservation incentives and water banks. Both were praised. The Committee meeting concluded with state reports on various legal developments.

The Executive Committee discussed sunseting positions, and approved renewal of a resolution asking that U.S. parties to a general adjudication be subject to the same state-imposed fees as any private water user.

Of note, with the election of new officers, changes have been made to Committee leadership. While Bill Staudenmaier agreed to continue to chair the Legal Committee, other new leaders were appointed, with Joan Card, Director of Arizona's Water Quality Division, chairing the Water Quality Committee, and Phil Ward, Director of the Oregon Water Resources Department, taking the lead for the Water Resources Committee.

On July 21, the full Council accepted the Committee reports and adopted a number of resolutions, letters and policy statements as revised and recommended (readopting a number of sunseting positions). Colorado presented information on various water issues and its Statewide Water Supply Initiative. Rick Brown, with the Colorado Water Conservation Board, described the public participation process used to bring state and local interests together to agree on water supply issues facing each basin and identify means of addressing future challenges. Of note, the process is predicated on the understanding that no one basin can solve its water supply problems at the expense of another basin. Russ George, Executive Director of the Colorado Department of Natural Resources, discussed the establishment of Interbasin Compact Committees (with interstate water compacts as a model) to help reach agreements between basins within the State of Colorado. Lastly, Roger Pulwarty, with the National Oceanic and Atmospheric Administration (NOAA), addressed understanding climate change.

Mr. Brown noted that Colorado is a party to nine interstate compacts and two apportionment decrees governing water use. Water originating in Colorado flows through eighteen other states. At present, total use in Colorado is around 2.6 million acre-feet (Maf) compared to the State's entitlement of about 3.855 Maf. Though it would appear to have surplus water, Colorado is one of the fastest growing states in the Nation. Further, its water supplies and population are not distributed proportionately. Some 80% of Colorado's water is on the West Slope (of the Continental Divide), while 80% of its people live along the Front Range (east slope of the Rockies). The Statewide Water Supply Initiative (SWSI) is an attempt to begin to deal with future water supply challenges in a collaborative manner through a number of basinwide roundtables. The process is intended to be inclusive and open, respecting local land and water use decisions, with an open mind towards future solutions to growing water problems. There have been 75 public meetings throughout the State, identifying issues and concerns, but the process has not yet reached the planning stage.

Mr. George, a popular former Speaker of the Colorado House of Representatives, observed he grew up in Rifle, Colorado on the West Slope with historical pioneer roots and the attitude that

“government should stay out of my life and especially my water!” Colorado politics and its legal system limit the role of state government. Colorado has never undertaken anything like the SWSI before. “Where are we headed in the future?” “Can we avoid a crisis?” “What will be the role of state government,” were some of the questions he asked. There seems to be public recognition of the fact that we have to address these questions, collaboratively. The future appears similar to the past, suggesting the continuing need for more storage and moving water between basins. However, the Colorado Supreme Court has upheld legislation that now allows any county to block transfers of water out of the county. As a result, there is also a recognition that we must consider and address each other’s water needs and wants. “What are you willing to give to get what you want?” Intrastate compacts may be a useful tool for interbasin water transfers. If the Seven Colorado River Basin States can use water marketing tools within an interstate compact to accomplish what some may have believed was impossible, “Why can’t we?” He candidly answered questions from the group, and concluded, “We’ll see where we get. We don’t know where the end is, and we don’t have to know [i.e. state government]. The people are responsible, and we’ve tapped their thinking. When people are ready, difficult decisions will be made.”

Mr. Pulwarty’s comments were hardly encouraging for water planners. He is part of an Intergovernmental Panel on Climate Change (IPCC), which will present a report next year that generally concludes the future will be warmer in the Northern Hemisphere. He has also been named as NOAA’s NIDIS coordinator. While approaching climate change and global warming with some skepticism, he confessed he is now a believer. He reviewed some of the facts. Temperatures in the West are the warmest since the 1950s, westwide snowmelt and peak streamflows are coming earlier in the year, many areas are suffering from multi-year drought, and inflows to Lake Powell are down 25%. The models and data seem to agree, “so how do we plan for the future?” Small temperature changes may bring big changes in the amount and manner of precipitation, as well as storage needs. Between 2010 and 2040, Colorado streamflows could drop by 17% and Colorado River storage by 36%. Portland could face an 8% decrease in precipitation. Precipitation changes are the hardest to model. Similar changes across the West will affect other states and river basins. Phenological changes (i.e., relations between climate and biological phenomena) will also take place. Some pieces of the puzzle are anthropogenic, and others are not. The challenge will be managing water given future climate changes and increasing uncertainty.

### **152<sup>nd</sup> Council Meetings - Sheridan, Wyoming October 4-6, 2006**

The 152<sup>nd</sup> meetings of the Western States Water Council were held in Sheridan, Wyoming at the Holiday Inn on October 4-6. First, a federal/state agency roundtable discussed the WGA/WSWC report, “Water Needs and Strategies for a Sustainable Future,” and a proposed scope-of-work, together with collaborative opportunities. Representatives from the U.S. Army Corps of Engineers, Environmental Protection Agency, Geological Survey, and Bureau of Reclamation discussed their willingness to help implement the recommendations in the report.

The State of Wyoming hosted an enjoyable field trip that included a visit to Tie Hack reservoir, a roller-compacted concrete dam, built to provide a secure city water supply for Sheridan and Buffalo. Of note, Corps requirements limited growth projections to 1%, while the area is now experiencing 3-4% growth due to the energy production business. After lunch, the tour took a look at different coalbed methane (CBM) production fields and related “produced water” handling activities that included a subsurface drip irrigation system for alfalfa, an on-site ion treatment and discharge system, and on and off-site storage ponds. While initially reluctant to take the water, many farmers and ranchers have been glad to have it during the recent drought.

The Water Resources Committee met Thursday morning, beginning with a status report on the Corps' Western Watersheds Study by Mike Bratlien, South Pacific Division Programs Director and Gene Lilly, the study lead. The study is designed to compliment the WSWC/WGA workplan. The Corps has a \$750,000 budget to work with, and another \$65,000 from related programs. The Corps sees this as a valuable bottom-up approach to identifying and providing needed watershed planning assistance. The Corps is helping coordinate other federal agencies' participation. He observed, "The more we link up, the more we can get done."

The Committee recommended the Council update a sunseting position on federal water and climate data collection and analysis. Next, there was an extended discussion on the nature and state of western state water plans, which vary significantly. Sixteen of the eighteen WSWC member states have some type of water plan, and the Committee will be asking for information on population projections, estimated water needs and water supply strategies. Ward Staubitz, USGS Cooperative Water Program (CWP) Coordinator, noted it is a \$200 million program that covers some 4,500 of 7,500 USGS streamgages and about 750 investigative studies. USGS Water Science Center Directors set funding priorities at the state level. He addressed stakeholder recommendations, endorsed by the WSWC, to improve communications and control costs. They will also sponsor regional stakeholder workshops.

Brenda Burman, USBR Deputy Commissioner, spoke to members on pending legislation (S.895) to authorize a rural water supply program and federal loan guarantees. The bill has passed the Senate, but not reached the House floor. Louis Mauney, USBR, then presented information on the Reclamation Fund, which was created by the Congress in 1902. Receipts come from certain sales, leases and rentals of federal lands in Reclamation States, as well as repayments and other revenues from water resource development. Since 1995, receipts have outpaced expenditures, mainly due to oil and gas leases and mineral royalties, which make up nearly half of all receipts. Expenditure from the Fund must be appropriated by the Congress. The estimated unobligated balance at the end of FY2007 is \$7.27 billion, and is growing at over \$900 million per year.

Other guest speakers included Barry Lawrence, with the Wyoming Water Development Commission, and Bruce Boe, with Weather Modification, Inc. They described an \$8 million study to evaluate and demonstrate the use of the technology in Wyoming.

The Water Quality Committee met in an extended concurrent session with John Wagner, Wyoming, and Bob Bukantis, Montana, providing their perspectives on CBM development, discharges, and interstate issues. Roger Gorke, EPA Office of Water, participated in a discussion of other issues, including Good Samaritan legislation, water transfers and NPDES permits, tribal water quality standards and treatment as states (TAS), wetlands guidance, selenium, effluent dependent and dominated waters, and Total Maximum Daily Loads (TMDLs). There was also a roundtable discussion of state water quality priorities, and the WSWC/WGA Water Needs and Strategies Report.

The Executive Committee spent much of its time discussing the water report, and a related scope-of-work. The Committee accepted, and WSWC Chairman Duane A. Smith signed, a "Shared Vision Planning" Partnership Agreement, to be signed by Major General Don Riley, Corps Director of Civil Works. It outlines collaborative efforts designed to support implementation of the recommendations in the report on water needs and strategies. The Committee considered other WGA work plan items, the WSWC budget, and sunseting positions.

The Legal Committee began with a telephone conference call discussing the Congressional Budget Office (CBO) report on "How Federal Policies Affect the Allocation of Water," with author



Natalie Tawil and others. The report was prepared at the request of Rep. Grace Napolitano (D-CA), and includes analysis and policy options.<sup>4</sup> The Committee intends to prepare an appropriate response. It raises some controversial issues related to federal-state primacy, Indian and water rights, constitutional Commerce Clause authorities, subsidies, markets and water use changes. Go to [www.cbo.gov](http://www.cbo.gov) for a copy.

Susan Cottingham, Montana, next described the continuing efforts of the Ad Hoc Group on Indian Water Rights to promote settlement negotiations. Susan noted that a June letter to Interior Secretary Dirk Kempthorne raised issues related to “languishing” settlements. A subsequent meeting in September with Michael Bogert, Counselor to the Secretary, Jennifer Gimbel, head of the Indian Water Rights Office, and other Interior officials raised hopes of a reinvigorated effort, though the cost of some settlements remains daunting. There was agreement that we don’t want to pit tribes against each other. The Nez Perce, Gila, Navajo and Zuni water right settlements were mentioned. Other topics discussed included state water export laws, tools under state law to secure water for endangered species needs, and redrafting a related state/federal protocol.

Members also reported on legal developments in their various states. Some interesting cases involve: Oklahoma’s negotiations with tribes treated as states under the Clean Water Act; a proposal to export ground water from the northwest corner of Arizona to Mesquite, Nevada; the Southern Nevada Water Authority filing for ground water rights in counties north of Las Vegas, including along the Utah border; administering surface and ground water rights in Idaho; a Corps lawsuit to recover costs related to construction of Sardis Reservoir from Oklahoma by garnishing federal payments to the state; a lawsuit by U.S. environmental groups and farmers in Mexico to stop lining of the All-American Canal; settlement of contract renewals related to the USBR’s Friant Project under California law; continuing negotiations between the seven Colorado River Basin States over how to manage the river during shortages; a draft settlement agreement between Montana and the U.S. Forest Service regarding water use; regulating domestic wells in New Mexico; state land office claims to federal reserved water rights for school trust lands; off-reservation acquisition of water in North Dakota; federal reserved rights claims by the National Park Service on the Black Canyon of the Gunnison River in Colorado; Kansas abandonment and forfeiture procedures; “pump and pipe” municipal water use certificates in Washington State; and the *Tacoma v. FERC* case.<sup>5</sup>

The 152<sup>nd</sup> Council meeting began with a welcome from Sheridan Mayor Dave Kinskey, who observed CBM development has resulted in a “strange twist of events,” as there is too much water available, and in the case of the Powder River, it is “too clean” to discharge into the naturally muddy stream. He noted Sheridan’s growth and his preference in talking about “cost of service” issues as opposed to growth moratoria. The city’s new water pipeline has set off a round of rural subdivision growth, with no related planning or provisions for needed roads, sewers, etc. Later, Mike Cole, Sheridan’s Utilities Engineer addressed in detail the area’s water supply and Twin Lakes Enlargement project.

Brenda Burman next addressed members and outlined USBR’s current priorities, including its Managing for Excellence (MFE) action plan, concept papers and related public meetings. The next meeting is on November 13-14, in Sacramento. For MFE details go to [www.usbr.gov](http://www.usbr.gov). She also expressed gratitude for the Colorado River Basin States efforts to agree on shortage sharing criteria, saying it has been a difficult process. They hope to have a related Environmental Impact Statement

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<sup>4</sup>*Western States Water Special Report*, Issue #1686, September 8, 2006

<sup>5</sup>*Western States Water*, Issue #1684, August 25, 2006

(EIS) completed by December 2007. She noted that Secretary Kempthorne signed a Platte River Agreement EIS on September 28, clearing the way for a \$300 million basinwide effort to improve habitat for four threatened or endangered species. Brenda discussed aging federal infrastructure needs, dam safety and leveraging federal resources in light of the current budget situation. She noted Interior's Water 2025 Initiative has used small investments to save some 300,000 acre-feet of water westwide. She also mentioned desalination.

Wyoming State Engineer Pat Tyrrell apprised members of the challenges related to CBM water treatment and water rights permitting needs, including a series of evolving policies and regulations for reservoirs, ponds, pits, wells, drains and ditches. The state was swamped with permit applications which created a backlog of 2,500 permits, that was since halved. The state has worked to integrate water quality, water rights and other environmental permitting requirements. Fines for non-compliance have also been raised significantly. Split surface estate and mineral leasing issues are also common. Wyoming is spending \$300,000 to map CBM impacted aquifers, but at present it appears that only 1% of the water available has been extracted.

## OTHER MEETINGS

### Western Governors' Association Annual Meeting

The Western Governors' Association (WGA) held its annual meeting in Sedona, Arizona on June 11-13. The meeting featured three plenary sessions entitled: "Clean Energy, A Strong Economy, and Healthy Environment;" "Growth and Conservation Strategies for the West;" and "Pandemic Flu: Prepared or Panicked?" During the second plenary, Arizona State Representative Tom O'Halleran (R-Sedona), who is also a member of the Western States Water Council (WSWC), introduced a multimedia presentation on the importance of the Verde River. He was followed by Duane Smith, Executive Director of the Oklahoma Water Resources Board and WSWC Vice Chairman. Duane presented the findings and recommendations in a report prepared by the Council for the governors entitled, "Water Needs and Strategies for a Sustainable Future." Following the presentation and subsequent discussion, the governors unanimously voted to adopt the report. Copies are available on the WGA website at [www.westgov.org](http://www.westgov.org).

Duane explained that the report was divided into six components as set forth in the WGA "Action Plan" adopted by the governors last December. He said the recommendations "...call for state assistance to local governments in assessing and responding to water-related impacts of growth and for collaborative actions to creatively address growing water supply needs. The recommendations urge greater attention to maintaining the vital water infrastructure of the West, and a greater priority to the settlement of Indian water rights claims." He added, "They call on us to significantly enhance our understanding and preparedness in the event of climate caused disruptions, and to develop and implement a means of furthering the Congressionally established policy of federal-state cooperation in protecting threatened and endangered species while planning and managing water for the diverse needs of the West." He gave examples of the 28 recommendations contained in the report and expressed the Council's desire to work with the governors to implement them. Lastly, he expressed appreciation for the opportunity to prepare the report.

Next, Bennett Raley, former Assistant Secretary of Interior for Water and Science, spoke to the governors. Having reviewed the WSWC report, he described it as "visionary and amazingly coherent," especially given the numerous and diverse group of people contributing to the report. He advised the governors to adopt it. He then described tools that work and those that don't with regard to water resource challenges. He emphasized the need for "reality checks," the importance of avoiding "process for process" sake," the risks in assuming that the federal government will be the answer, and the problems related to waiting for complete consensus before acting. He suggested climate change is a distraction, stating that it is already clear that there is substantial variability in historical precipitation patterns in the West and we need to be prepared. He also warned too much reliance can be placed on the trust responsibility of the federal government with regard to Indian water right settlements, adding such settlements contain substantial benefits for non-Indians.

#### *Water Needs and Strategies for a Sustainable Future - Recommendations*

The following is a list of the recommendations in the report, "Water Needs and Strategies for a Sustainable Future," adopted without change by the governors. The recommendations fall under six categories covering growth, State water data needs and strategies to meet future water demands, infrastructure, Indian water rights, climate change and aquatic endangered species. The Council proceeded to prepare a list of tasks to implement each of the recommendations, which was completed in August. Moreover, the Council collaborated with federal agencies in an effort to leverage federal and state resources to address the identified tasks. Specifically, the U.S. Army Corps of Engineers began a Western States Watershed Study to support implementation of the

recommendations in the report. Other federal agencies were encouraged to cooperate, under their ongoing authorities and programs, and help with the identified tasks. The WSWC was primarily responsible for facilitating joint actions to implementation of each of the recommendations.

### *Water Policy and Growth*

1. A. To foster sustainable growth policies, states should identify water requirements needed for future growth, and develop integrated growth and water supply impact scenarios that can be presented to local decision makers.

1. B. States should facilitate collaborative watershed-focused planning that balances desirable growth and protection of the natural environment that depends on surface and ground water quantity and quality.

1. C. In reviewing applications for new water uses, transfers and changes in use, including instream flows, states should consider local, tribal and watershed plans and decisions regarding growth management.

1. D. States and local governments should consider the impacts of continued growth that relies on transfers from agriculture and rural areas, and identify feasible alternatives to those transfers.

### *State Needs and Strategies to Meet Future Demands*

2. A. Federal and state agencies should increase support and funding for state and federal basic water data gathering activities that can serve as the basis for sound decision making.

2. B. Use the research programs at western state universities to focus research on practical applications of promising new technologies.

2. C. Strongly support enactment of the National Integrated Drought Information System Act of 2006 (H.R. 5136 and S. 2751) to make permanent a National Integrated Drought Information System (NIDIS), as well as broader national drought preparedness legislation.

2. D. The WSWC should encourage states to develop and implement strong state water plans and compile a state-by-state and Westwide summary of existing water uses, water plans and planning efforts, current ground and surface water supplies, and anticipated future demands, then identify and evaluate trends and common themes. The focus should be on a grassroots, watershed approach to identifying water problems and potential solutions.

2. E. The WSWC should explore the relative merits and obstacles related to various programs and technologies and legal and institutional means to augment existing water supplies. Based on the findings, the WSWC should initiate discussions on an interstate level to optimize appropriate opportunities to ensure that adequate supplies of suitable quality are available.

2. F. The WSWC should hold a workshop in collaboration with relevant federal agencies and other stakeholders to evaluate federal and state watershed programs and strategies, and examine in particular the commitment of resources to the watershed approach and the level of coordination among federal agencies and between federal and state agencies, Tribes, conservation districts, municipalities, NGOs, etc.

### *Water Infrastructure Needs and Promising Strategies for Meeting Them*

3. A. The WGA should support continuing stable federal State Revolving Fund appropriations at a level of \$1.35 billion for the Clean Water SRF and \$850 million for the Drinking Water SRF, increased annually by a construction inflation index. Further, states need flexibility and fewer restrictions in addressing their priorities.

3. B. The WGA should urge Congress to increase appropriations from annual receipts (now over \$1 billion) accruing to the Reclamation Fund, for authorized Bureau of Reclamation projects and purposes.

3. C. The WGA should ask Congress to enact S. 895 (“The Rural Water Supply Act of 2005”) to assess rural water supply needs and authorize federal loan guarantees under Title II to better enable non-federal project sponsors to obtain private financing for reimbursable extraordinary operation and maintenance, rehabilitation and replacement costs.

3. D. Congress needs to enact new authority for the U.S. Army Corps of Engineers, the Water Resources Development Act (WRDA), which includes many projects important to the West, and carefully consider planning and prioritization changes to encourage achievement of the maximum regional and national benefits.

3. E. The WGA should encourage all levels of government to maximize opportunities for a coordinated regional and/or watershed approach under state and federal water pollution control laws to source water protection, stormwater management and non-point source pollution.

3. F. The WSWC should identify the beneficiaries of our existing water infrastructure and opportunities to expand the range of interests to build a coalition to support necessary funding, as well as evaluate any opportunities to consolidate delivery of water-related services.

3. G. The WSWC should identify successful water resources-related infrastructure and natural resources management partnerships and evaluate organizational opportunities for public/private, federal/state/local, agency/agency, agricultural/urban and other effective partnerships.

3. H. The states should develop coordinated public education and other outreach programs to help survey and communicate the need for adequate public infrastructure investments at all levels of government.

3. I. The WSWC should organize a series of ongoing biennial symposia designed to: (a) bring stakeholders together to try and find ways to meet our growing western water, wastewater, watershed protection and restoration, and public safety-related infrastructure funding needs; (b) find ways to quantify, evaluate and prioritize those needs; and (c) highlight the benefits of integrated watershed, riverbasin, regional and interstate planning and management.

### *Resolution of Indian Water Rights*

4. A. Reaffirm the resolution of the Western Governors’ Association on settlement of Indian water right claims.

4. B. Building on the successes of the past two decades, the WGA should engage Congress in an important discussion of what federal policy should be and how these settlements can be funded.

4. C. The WGA should appeal directly to the new Secretary of Interior to begin a meaningful dialog on the Departments' trust and programmatic responsibilities related to Indian water right settlements.

#### *Preparation for Climate Change Impacts*

While recognizing the uncertainties inherent in climate prediction, efforts should be made to focus on vulnerabilities and building increased resiliency to climatic extremes.

5. A. Data Collection – The federal agencies must continue and expand funding for data collection networks and activities necessary for monitoring, assessing, and predicting future water supplies as addressed earlier herein by the Water Needs and Strategies group recommendation (2A).

5. B. Improved Prediction, Modeling, and Impact Assessment – The Western Governors should urge Congress and the Administration through the Climate Change Science Program (CCSP) to fund research for improving the predictive capabilities for climate change, and assessment and mitigation of its impacts. Additionally, given the complex climatology in the West, it is important that climate change modeling be conducted at a much finer resolution, e.g. watersheds and subwatersheds.

5. C. State Planning –

(1) The Governor of each state should direct their state climatologist, relevant water and environmental agencies, and universities to assess historical, current, and projected climate trends for their particular state and relate these to potential changes in water supply and water quality.

(2) States maintain various water-related plans, including state water plans, watershed plans, state drought plans, reservoir management plans, flood plans, etc. These plans should be expanded or enhanced accordingly to include climate change scenarios.

(3) States should coordinate with and include local governments in their climate change planning efforts.

(4) States should evaluate and revise as necessary the legal framework for water management to the extent allowable to ensure sufficient flexibility exists to anticipate and respond to climate change.

5. D. Ongoing Coordination & Information Sharing Between Scientists, Policy-Makers, and Water Users – The Governors should convene ongoing, broad stakeholder meetings between state water managers, local water supply managers, scientists, federal agencies, universities, and others to make sure water managers understand what the science is saying about climate change and what new tools exist, and, conversely so that scientists understand the data and research needs of water managers and users.

#### *Coordination and Cooperation in Protecting Aquatic Species under the Endangered Species Act*

6. A. Working with representatives of the federal implementing agencies, and soliciting input from other federal agencies and stakeholders, western state representatives under the auspices of the WSWC should establish a protocol outlining objectives and principles for implementing ESA Section 2(c)(2). Its objective should be to minimize conflicts arising between the use of water for the needs of listed species and other water uses and to foster cooperation and consultation between

Federal and State governmental entities to enhance species protection and recovery, while protecting rights to water use.

6. B. Identify tools under western state water law that can be used to provide water for threatened and endangered species protection.

### **Water Information Management Systems Workshop**

On September 12-15, the Western States Water Council, U.S. Geological Survey (USGS) and the New Mexico Office of the State Engineer (OSE) cohosted a workshop on Water Information Management Systems (WIMS) and Water Availability. It was preceded by a training session on the USGS National Hydrography Dataset (NHD), which is a comprehensive set of digital spatial data about surface water features, such as lakes, ponds, streams, rivers, and springs. When combined to form "reaches," it provides a framework for linking water-related data to the surface drainage network, and allows users to display and analyze water-related data in upstream and downstream order.

The NHD is part of the USGS Mapping/Geography Division, and was initiated with \$20M from USGS and the Environmental Protection Agency (EPA). It is based upon the content of USGS Digital Line Graph (DLG) hydrography data integrated with nationwide reach-related information from the EPA Reach File Version 3 (RF3). The NHD supersedes DLG and RF3 by incorporating them, not by replacing them, with a greatly expanded and refined capacity. While initially based on 1:100,000-scale data, a \$50 million upgrade to a 1:24,000 scale will be completed in March 2007. The NHD is designed to incorporate and encourage the development of higher resolution data required by many users. NHD+ now provides streamflow volume and velocity data for any reach, as well as mean annual flows, time of travel and elevation grids, etc.

However, USGS downsizing threatens further NHD development. Therefore, USGS is seeking to turn NHD over to states for "fine tuning," with states adding the location of gages, dams, water diversions, canal flows, fish habitat, water quality and other data. USGS would provide training support and data quality control and assurance. Pennsylvania uses NHD as its framework for determining water availability. Western states with NHD agreements in place or being negotiated include California, Colorado, Idaho, Kansas, Montana, New Mexico, North Dakota, Oregon, Utah, Washington and Wyoming. USGS asked for \$1.25 million in FY2007 for agreements in 24 states, but some \$2 million is needed. For more NHD information, contact Jeff Simley, USGS, at [jdsimley@usgs.gov](mailto:jdsimley@usgs.gov) or (303) 202-4131.

On Wednesday, September 13, USGS experts from across the West addressed a variety of models and other information for projecting water supply needs and determining water availability. Rain, snow and storage are the major components of water supply in the West said George Leavesley, USGS National Research Program, Denver. The National Weather Service (NWS) and Natural Resources Conservation Service (NRCS) provide much of this information. "We all use history as an analogue for the future," said Leavesley, "but the future may be very different from the past." He used as an example evidence that snowmelt and peak spring runoff are coming earlier. Water managers need to know how much water they will have and when it will come. They have to work with uncertainty and there are many models that provide, high, low and median forecasts. However, there is no one perfect model. Sometimes "ensemble modeling," using regression analyses and the mean and median from a number of models, can improve forecasts. Often the simpler models prove to be the most efficient, as the more complex a model is, the more demanding are its needs for data, maintenance, etc.

Bill Alley, Chief, USGS Office of Ground Water, addressed issues of sustainability and the long term effects of climate change on ground water. USGS is now conducting ground water availability studies in the Denver Basin, Great Basin, and California's Central Valley. The latter ranks just behind the Ogallala Aquifer in water production. He also mentioned cooperative work in the Middle Rio Grande, involving different USGS programs. Of note, he explained that relatively small ground water depletions can have large effects. Arizona's San Pedro Basin ground water use has consumed only 2% of the estimated 23 million acre-feet (Maf) in storage, but that has raised concerns over land subsidence, aquifer compaction and the loss of wildlife habitat and vegetation dependant on ground water.

Others speaking included: Dave Prudic, USGS Nevada Water Science Center (WSC), on modeling ground water and surface water interactions; Stan Leake, Arizona WSC, on Southwest ground water availability studies; Doug McAda, New Mexico WSC and Peggy Barroll, NM OSE, on ground water in the Albuquerque Basin; Wes Danskin and Eric Reichard, California WSC, on optimization modeling, and artificial recharge and water quality, respectively; Terry Maret, Idaho WSC, on modeling ecological water needs; and Glenn Patterson, Cooperative Water Program Coordinator, who provided introductory and summary comments.

On Thursday, September 14, WSWC Chairman Duane Smith, Oklahoma Water Resources Board, welcomed those attending and addressed briefly the WSWC report on Water Needs and Strategies adopted by western governors. A significant part of the report addresses water availability and the continuing need for more and better information for decisionmakers. New Mexico State Engineer John D'Antonio, a WSWC member, next spoke to the group and described a number of water resources challenges that all require sound science and adequate data for decisionmaking. New Mexico's population is expected to grow by 85% by 2050, and a state water plan to meet anticipated water needs is being updated, integrating 16 regional plans. It is a very transparent process, meeting with people face-to-face, but there is still a lot of conflict.

New Mexico has initiated Active Water Resources Management in seven basins as a response to drought, other water shortages, and the potential need to administer rights to the use of water by priority. The state is also seeking to accelerate completion of eleven water rights adjudications involving some 65,000 claims. They are going out into the field with geographic information system (GIS) technology and ownership information, showing users what their defined rights are. They are converting paper files to digital images, maps and abstracts. New Mexico has over 185,000 water rights files totaling some three million pages. The work of scanning these files has been brought "inhouse," due to quality control concerns with earlier contract work. It is estimated it will take about fourteen years to fully populate the water rights database. Water banking and water transfers, leases, and other water management tools all depend on well defined water rights.

Other state presentations included: Joe Summers, further describing New Mexico's evolving water rights information system; Sam Perkins on modeling surface water availability in southeast Kansas; Jeremy Manley on Wyoming's well monitoring data; Michael Sughru on Oklahoma's online water information mapping system; Bob Harmon and Ken Stahr on Oregon's surface water availability, watershed and streamflow modeling; and Michael Ciscell on Idaho's Eastern Snake Plain Aquifer ground water model.

In addition, the Upper Rio Grande Water Operations Model was explained by Mike Roark, USGS New Mexico WSC, and Dennis Garcia and Roberta Ball, with the U.S. Army Corps of Engineers Albuquerque District. Ken Pathak, Corps Engineering Research and Design Center in Vicksburg, Mississippi, demonstrated the use of a GIS tool bar developed to allow access to other databases across different platforms. Tom Pagano, National Water and Climate Center in Portland,



described NRCS activities to improve water supply forecasts and provide new data products. Finally, Steve Bowser, U.S. Bureau of Reclamation in Albuquerque, presented information on tools for estimating evapotranspiration, which is a major component of operational storage releases where water uses may be some 125 miles downstream from reservoirs. All the powerpoint presentations made at the workshop are available at: [www.westgov.org/wswc/meetings.html](http://www.westgov.org/wswc/meetings.html).

## **Evolving Water Management Technologies and Emerging Water Issues**

On November 15-17, the Western Governors' Association, Western States Water Council and California Department of Water Resources, with cooperating federal agencies, sponsored a symposium entitled "Water in the West: Evolving Technologies and Emerging Issues" in Irvine, California. Over 50 senior scientists, water managers and state and federal officials came together to discuss current state-of-the-art practices with respect to water recycling and reuse, artificial ground water recharge, conjunctive use, weather modification and desalination, as well as future water management within the context of climate change, increasing climate variability and growing populations.

Experts were asked to answer a number of questions: What do we know? What don't we know? What do we need to know? With respect to various technologies, they were asked: What are its primary advantages? What are the most significant challenges or obstacles? What are some of the legal and institutional obstacles? What social and economic issues have emerged? What technical and environmental challenges must be overcome? How important will technology be in meeting future western water needs? What is its potential role in an integrated water resources supply augmentation plan? and What should be the role of local, state and federal agencies in facilitating future progress and development of technology? They addressed these and other questions using various case studies and powerpoint presentations posted on the WSWC website.

Chuck Hennig, Acting Director for Research and Development with the U.S. Bureau of Reclamation (USBR), kicked off the federal presentations. He described USBR's research and development (R&D) agenda and "sideboards" for investments which include technical quality, relevancy and performance. Further, the Office of Management and Budget (OMB) has rated USBR's program as "effective," the highest ranking using the OMB's Program Assessment Rating Tool (PART). In general, there is always uncertainty and two sides to all scientific debate. He referred to a National Academy of Science (NAS) report that concluded there is no conclusive evidence that weather modification works, but there are 66 non-federally financed programs operating in ten states. He also pointed to a letter from the Office of Science and Technology Policy (OSTP) raising scientific, legal liability and international law questions related to weather modification. Vegetation management, specifically salt cedar control, was another topic he raised, in light of new federal legislation.

Avra Morgan, USBR Water 2025 Coordinator, talked about the impressive potential water savings, up to 250,000 acre feet, from the relatively small investment in collaboration to improve water supply and distribution works at the local water district and watershed level. She also noted federal financial assistance for water reuse and recycling projects was authorized in 1992, and since then 32 projects have been authorized, 21 funded and 13 completed. As a result, in 2005, some 118,000 acre-feet of recycled water was put to use. USBR has spent \$325 million on reuse projects, and another \$340 million is needed to complete the backlog of authorized projects. She concluded the technology is a viable alternative for urban areas, but the federal role needs to be better defined and legislation has been introduced to establish a coherent program, in place of past direct congressional project-by-project authorizations.

Beth Faber, with the U.S. Army Corps of Engineers' Institute for Water Resources, Hydrologic Engineering Center (HEC), noted the Corps operates some 700 reservoirs. HEC has developed an integrated Corps Water Management System (CWMS), a suite of analytical hardware, software and communications tools run in succession to help water managers evaluate the impacts of different potential operations decisions. It is a very powerful tool for real-time decisionmaking that might be adapted to non-Corps projects to improve water management system efficiencies. HEC-WAT is another longer-term management model that may be used to consider the impacts of changing system components, as well as changing climate and hydrologic regimes. Corps watershed analysis tools include flood damage, hydrology, hydraulics, reservoir operations, ecology and environmental models, while others are "in the birthing process." Lastly, she discussed the Corps Shared Vision Planning (SVP) process to bring together technical and analytical tools and stakeholders to build understanding, confidence and trust - in order to reach agreement on water management actions. SVP structures collaboration and communication through concentric "circles of influence," to identify and address both "value" and "science" questions. The Corps has used SVP in the Middle Rio Grande, Okanogan and Mississippi basins.

Martin Hoerling, with the National Oceanic and Atmospheric Administration (NOAA), Earth Systems Research Lab in Boulder, Colorado presented a very sobering picture of potential future water supplies in the Colorado River Basin shared by seven states. He noted we are still in the throes of drought, which may be the result of natural variability or a changing climate. We don't know. Uncertainty is a factor in decisionmaking due to inadequate scientific understanding and the difficulty in forecasting human behavior. As a result, our policies must be based on risk management and probabilities, looking at potential extremes and avoiding unacceptable consequences. Colorado River flows measured at Lee's Ferry, between the upper and lower basins, was about 72% of "normal" this past year and the trend has been downward since 1900. The last seven years are the lowest flows in the "instrumental" record. Will reservoir levels recover, or will Glen Canyon and Hoover Dams "become monuments to the past?" Some model projections are discouraging.

Robert "Robin" Webb, NOAA, followed with a timely discussion of the National Integrated Drought Information System (NIDIS) and proposed legislation to authorize a national drought preparedness policy and programs. The intent is to integrate existing data networks and forecasting capabilities in order to provide water managers with the best, most timely information possible to facilitate risk assessment and decisionmaking. A NIDIS bill authorizing \$80 million for research and development of the system has passed the House, and will hopefully pass the Senate in December. Brad Udall, working with NOAA through the University of Colorado, described NOAA's Regional Integrated Sciences and Assessments (RISA) Program. RISAs are designed to help link decisionmakers with the best research in the Nation on the impacts of climate variability on water resources, agriculture, public health, wildfire, fisheries and energy. Western RISAs include the California Applications Program (CAP), Pacific Northwest Climate Impacts Group (CIG), Climate Assessment for the Southwest (CLIMAS) and Western Water Assessment. RISAs are "place-based" research projects designed to be useful and usable by the public.

Bill Alley, U.S. Geological Survey (USGS), Chief of the Office of Ground Water, and Eric Reichard, Director of the USGS California Water Science Center, talked about advances in ground water technology and resource assessment. The USGS MODFLOW ground water flow model is the most popular. USGS is also working on a MODFLOW package to assess farm use that estimates pumping, surface water diversions and crop transpiration. SEAWAT is a version used in coastal areas to evaluate salt water intrusion. GSFLOW is a basin-scale model for simulating ground water and surface water flows that should be released next year. New field monitoring techniques are also developing using heat transfer physics and fiber optic technology to sense and measure hydraulic

changes. Decades of agricultural and urban water use and ground water recharge have displaced much of the native ground water. Water recycling, nitrate contamination in unsaturated zones, recharge and salt water intrusion are all pressing interests in southern California.

Phil Pasteris, Acting Director, and Tom Pagano, with the National Water and Climate Center (NWCC), U.S. Department of Agriculture, Natural Resources Conservation Service described their snow survey and water supply forecasting program capabilities. NWCC is constantly trying to anticipate and meet clients' forecasting needs using various tools and GIS products (MS Office, ArcMap, Object Modeling, Excel, the Internet, SNOTEL snowpack and precipitation maps - real-time and with analysis - Google Earth, etc.). In addition to its own data gathering system of SNOTEL and Soil and Climate Analysis Network (SCAN) sites, NWCC grabs and distributes spatial data (across platforms). They are working on automated forecasting/statistical regressions, web-based forecast evaluations, Visual Interactive Prediction and Estimation Routines (VIPER), and other applied technology research and development activities.

Following these federal agency presentations, a series of expert panels addressed various technological and water supply questions, beginning with climate variability: Dave Meko, University of Arizona (paleo-climatologist), Dan Cayan, USGS and Scripps Institute; Michael Anderson, California State Climatologist; George Leavesley, USGS; and Tom Pagano. A key point seems to be that looking backward, it is apparent we are in a different era than anything seen in the past, and looking forward, in many ways water supply management is only going to be even more challenging. Continuing scientific discovery must be incorporated in decisionmaking. There is no deterministic answer as to how much water we are going to have, but given the risks, we can't wait to take action.

Roger Patterson, Assistant General Manager of the Metropolitan Water District of Southern California (MWD), discussed their wholesale "water portfolio," and the needs of their 18 million customers, expected to grow by 5 million over 20 years. Water recycling and reuse, described as an "all weather supply," was discussed by a panel that included utility and water district managers from Orange County, Santa Clara Valley, Las Vegas and Denver. State and local officials from Arizona, California, Nevada and Oregon discussed ground water recharge and conjunctive use. The group toured Orange County recharge basins and water reuse/replenishment facilities. Weather modification was addressed by experts from the Desert Research Institute and National Center for Atmospheric Research, as well as water managers from the upper and lower Colorado River basin. Desalination and Colorado River salinity control was the final panel topic, with regional, state, local and industry experts. See the powerpoint presentations at [www.westgov.org/wswc/meetings.html](http://www.westgov.org/wswc/meetings.html).

## OTHER IMPORTANT ACTIVITIES AND EVENTS

### Council Staff and Membership Changes/News

#### Arizona

**Michael Brophy**, our friend and colleague, died unexpectedly on Monday, September 18, of complications from his valiant battle with cancer. The Council expressed its condolences in a Resolution of Appreciation presented to his wife Marilyn. Mike served as a member between 1991 and 2002, including two years as the WSWC Chairman, and as Chairman of the Legal Committee.

#### Idaho

**Karl Dreher**, Director of the Idaho Department of Water Resources resigned, with the election of a new governor, having served as Director since 1995, when he was also appointed as a WSWC member. Karl was an active participant in Council operations, serving as Chairman for two years and making many other contributions to advancing the Council's purposes.

#### Montana

**Jack Stults** resigned as Administrator of the Montana Water Resources Division, and was replaced as a WSWC member. He was named to the Council in 1997. He attended regularly and was actively involved as Chairman of the Water Resources Committee, as well as the Council's Secretary-Treasurer.

#### Nebraska

Governor Dave Heineman, appointed **Ann Diers**, Legal Counsel, Nebraska Department of Natural Resources to the Council.

#### Nevada

Governor Kenny Guinn appointed **Tracy Taylor** as Nevada State Engineer and as a WSWC member, replacing **Hugh Ricci**. Hugh retired after some 36 years of service to the state, including 15 years as a WSWC member, serving on the Water Resources Committee.

#### New Mexico

Governor Bill Richardson realigned the state's WSWC representation, which consists of: State Engineer **John D'Antonio**, Environment Secretary **Ron Curry**, and **Bill Hume**, Governor's Director of Policy and Issues. Alternate members include: **John Utton**, **Maria O'Brien**, **Eileen Grevey Hillson**, **Fred Lujan** and **Sherry Tippett**, who was later replaced by **Lynn Trujillo**.

#### North Dakota

**Matthew Sagsveen**, North Dakota Assistant Attorney General, was appointed as a WSWC member by Governor John Hoeven, and added to the Legal Committee, replacing **Julie Krenz**. Julie was appointed in 1990.

## Utah

**Dennis Strong**, was named by Governor Jon Huntsman as the new Director of the Utah Division of Water Resources, and as a member of the Western States Water Council. He served as Deputy Director under **Larry Anderson**, who recently retired. Larry will continue to represent Utah on the Council.

**Dee Hansen**, a former Director of the Utah Department of Natural Resources, and Director of the Division of Water Rights, was replaced on the Council by Dennis. Dee was appointed as a WSWC member in 1985, actively serving over 21 years on various committees and subcommittees, and as the Council's Secretary-Treasurer.

**Thorpe Waddingham**, a charter WSWC member from Utah and prominent lawyer and former state legislator, passed away on September 18, at the age of 83 after a long struggle with Alzheimer's disease. He was also a former member of the Upper Colorado River Commission.

## Wyoming

Wyoming Governor Dave Freudenthal appointed **Peter Michael**, Attorney General's Office, to replace **Hugh McFadden** as a WSWC member.

## **Western States Water**

Since the first issue in 1974, the Council's weekly newsletter, *Western States Water*, has been one of its most visible and well received products. Its primary purpose is to provide governors, members and others with accurate and timely information with respect to important events and trends. It is intended as an aid to help achieve better federal, state, and local decisionmaking and problem solving, improve intergovernmental relations, promote western states' rights and interests, and highlights issues. Further, it covers Council meetings, changes in Council membership, and other Council business. The newsletter is provided as a free service to members, governors and their staff, member state water resource agencies, state water users associations, selected multi-state organizations, key congressmen and their staffs, and top federal water officials. Other public and private agencies or individuals may subscribe for a fee.

The following is a summary of significant activities and events in 2006 primarily taken from the newsletter. However, this does not represent an exclusive listing of all Council activities or other important events. Rather, it seeks to highlight specific topics.

## **Bureau of Reclamation**

### FY2007 Budget

Interior Secretary Gale Norton testified before the Senate Energy and Natural Resources Committee on March 2, saying, "As water supply challenges increase in the West, the Bureau of Reclamation is positioning itself over the long term to help prevent crises and conflict. Water 2025 affirms this goal by focusing resources on increasing certainty and flexibility in water supplies, diversifying water supplies, and preventing crises through added environmental benefits in many watersheds, rivers, and streams. The 2007 budget request includes an increase of \$9.6 million for

Water 2025, for a total funding level of \$14.5 million. The additional funding will allow the Bureau to promote the use of effective, low cost approaches to increase water supplies, including improvements to existing irrigation facilities, installation of computerized water measurement and canal control devices, increasing water marketing opportunities, and making water purification more affordable. In many basins in the West, where water demands for people, cities, farms, and the environment exceed the available supply even in normal, non-drought years these changes will significantly help to prevent crises and conflicts.”

She continued highlighting the CALFED program. “CALFED is a comprehensive, long-term program to address the complex and interrelated problems in the Bay-Delta, the watersheds that feed it, and the areas served by the waters diverted out of it. A consortium of federal and state agencies fund and participate in the program. The Calfed Bay-Delta Authorization Act of 2004 provides a six-year Federal authorization to implement the CALFED collaborative plan for restoration and enhancement of the Delta estuary. The CALFED plan provides a long-term solution to the complex and interrelated problems in the Bay-Delta and is the foundation for the actions taken by the Federal and State consortium, which is focused on goals to improve water management and supplies and the health of the ecosystem. The 2007 budget includes \$38.6 million for the Bureau of Reclamation to implement CALFED activities, nearly \$2 million more than the 2006 enacted level.”

Senator Jeff Bingaman (D-NM), the Committee’s ranking minority member, said, “I’d like to discuss water issues and assess what role the federal government should play in helping our country meet its future water needs. The President’s budget for all federal water resource programs raises significant concerns from my perspective. Beyond its obvious role in sustaining life, a stable and reliable water supply is one of the core foundations for the economic activity that sustains our communities. With issues related to population growth, environmental needs, protection of agricultural communities, and ongoing drought, the challenges with respect to water resources in the 21<sup>st</sup> Century are endless.”

He added, “From my perspective, the Federal government needs to be partnering with States and local communities in helping them to (1) address infrastructure needs; (2) identify new sources of water and the sustainability of existing supplies; (3) develop new technologies to increase the available water supply; (4) resolve environmental issues; (5) implement water conservation projects; and (6) quantify federal water rights claims to promote effective water management. Unfortunately, the President’s budget misses the mark in all these areas and does not reflect the importance of water in this country. Nor does it help deal with the challenges already facing many regions. While I know the FY 2007 budget is tight, there are still a lot of choices to be made, and the decision to go after water programs seems to be out of step with the needs I hear from my constituents and others....”

Rep. Cathy McMorris (R-WA), Vice Chair, added: “One of my top priorities in Congress is to provide economic growth for Eastern Washington. Without a doubt, it is crucial that we have an adequate water supply in order to meet the irrigation needs of our agricultural community. I am deeply concerned about water reliability in the Columbia Basin Project in Washington State, specifically the Odessa Aquifer that is impacting the future of farming in this area.... There are approximately 170,000 irrigated acres within the Odessa Sub-Basin covering parts of Lincoln, Grant, Adams and Franklin counties. Since the second half of the Columbia Basin Project was never completed, pumping from the underlying aquifer has lasted longer than planned, and the aquifer has been declining 10 to 20 feet per year. Right now we are facing a potential loss of 35,611 acres of irrigated potato land within the sub-basin. This equates to a loss of \$630 million in revenue annually and 3,600 jobs. I have listened to many people with concerns about water shortages....”

Commissioner John Keys testified: "Our FY 2007 request has been designed to support Reclamation's efforts to deliver water and generate hydropower, consistent with applicable State and Federal law, in an environmentally responsible and cost-efficient manner. The funding proposed is for key projects that are important to the Department and in line with Administration objectives. The budget request also supports Reclamation's participation in efforts to meet emerging water supply needs, to address water shortage issues in the West, to promote water conservation and improved water management, and to take actions to mitigate adverse environmental impacts of projects." He highlighted Water 2025 and several Bureau projects and programs.

### *Managing for Excellence*

On April 5, the House Resources Committee's Subcommittee on Water and Power, held an oversight hearing on the "Bureau of Reclamation's 21<sup>st</sup> Century Challenges in Managing, Protecting and Developing Water and Power Supplies. Assistant Secretary of Interior Mark Limbaugh testified and discussed an action plan, "Managing for Excellence," prepared in response to the 2006 NRC report, "Managing Construction and Infrastructure in the 21<sup>st</sup> Century Bureau of Reclamation." Limbaugh noted the NRC report was prepared at Reclamation's request, "...to get expert review and comment from third parties on our business practices and capabilities as we face the decades ahead." NRC spent most of 2005 consulting with Reclamation and Interior policymakers (both career and Presidentially appointed), Reclamation operations staff, water and power customers, congressional staff, and other government water agencies, both federal and state.

The NRC recommendations for Reclamation focus on nine issue areas: (1) centralized policy and decentralized operations; (2) Reclamation's technical service center; (3) laboratory and research activities; (4) outsourcing; (5) asset sustainment planning; (6) project management; (7) acquisition and contracting; (8) relationships with sponsors and stakeholders; and (9) workforce and human resources. The NRC listed 22 distinct findings and 24 recommendations. A copy of the NRC report may be found at <http://fermat.nap.edu/catalog/11519.html>.

Limbaugh highlighted the following, representing the scope of the NRC's work. "Reclamation's customers and other stakeholders want close contact with empowered Reclamation officials, but they also want consistency in Reclamation policies and decisions, and decision makers with demonstrated professional competence. Policies, procedures, and standards should be developed centrally and implemented locally. Reclamation should perform an in-depth review of its own Technical Services Center (TSC) to identify the core competencies it needs, the number of personnel it needs, and its optimum structure. This TSC assessment should be reviewed by independent experts and stakeholders. Reclamation's laboratory organization and its physical structures may be too large. Operation and maintenance (O&M) and other functions should be more aggressively outsourced. Long-term sustainment of aging infrastructure will require more innovation and greater efficiency. Reclamation should give high priority to completing and publishing cost estimating directives and resist efforts to submit projects to Congress with incomplete project planning. The growing need to include a broad spectrum of stakeholders alters Reclamation's tasks and the skills required to accomplish them. Personnel must be equipped to address both technical uncertainties and the ambiguities of future social and environmental outcomes."

He observed, "Mr. Chairman, you know Reclamation and its water and power customers well enough to appreciate how serious these and other challenges detailed in the NRC's report are. Reclamation is up to the challenge. We are determined to take advantage of this opportunity to implement reforms with the goal of reinvigorating our program and ensuring that we will be able to

provide optimum value to our stakeholders well into the future. Before the ink was dry on the NRC report, Deputy Secretary Lynn Scarlett, (now Acting Secretary) directed us to develop a plan whereby Reclamation would address each finding and recommendation in the NRC report. The Commissioner appointed a Reclamation executive team led by Deputy Commissioner Larry Todd. With helpful input from an array of stakeholders, the team produced, 'Managing for Excellence: An Action Plan for the 21<sup>st</sup> Century Bureau of Reclamation,' and delivered it to Secretary Gale Norton in February."

The Reclamation team consulted in preparing its action plan with House and Senate committee staff, the Family Farm Alliance, National Water Resources Association, and Trout Unlimited, and "the federal employees who care so much about the Bureau mission from rank-and-file Reclamation field workers to Secretary Norton, herself, who offered several crucial comments as the document was being developed." Next, turning to *Managing for Excellence* and how Reclamation expects to carry it out, Mr. Limbaugh offered that it is a "plan for decisionmaking that exceeds the original expectations of many of us involved." Each NRC finding and recommendation is addressed, but Reclamation's team went further, drawing on key Presidential Management Initiatives, a Reclamation customer satisfaction survey, and other internal reports and recommendations. As a result, it is a far more comprehensive and cohesive product.

*Managing for Excellence* is actually a catalogue of 41 separate action items, each of which requires critical thinking and some tough decisions. Further, each action item has a specific timeline for completion, and the timetable is ambitious. The schedule provides enough time "to get it right but not so much time that the benefits of implementing decisions would be needlessly delayed." Twenty-nine of the 41 action items are scheduled to be completed and recommendations forwarded to senior Reclamation management in 2006. Numerous action teams have been charged with carrying out the action items. The teams and their leaders have been chosen for their "intellectual honesty and for being committed to carrying out the Reclamation mission...[and] a reputation for ingenuity and achievement in communication, consultation, and cooperation with diverse stakeholders."

The 41 action items are organized under the following eight headings, which follow, with senior leadership assignments: (1) Relationships with Customers and Other Stakeholders, David McCarthy; (2) Policies and Organization, Roseann Gonzales; (3) Engineering and Design Services, Maryanne Bach; (4) Major Repair Challenges, Mike Ryan; (5) Project Management, Rick Gold; (6) Asset Sustainment, Bill Rinne; (7) Research and Laboratory Services, Maryanne Bach; and (8) Human Resources/Workforce, Larry Todd.

Assistant Secretary Limbaugh reported, "The teams have already started working. Each one has prepared a work plan which includes timelines for steps from gathering data and perspectives, to analysis, to final decision recommendations on the schedule set out in *Managing for Excellence*. Will each action item succeed? The answer may turn on the involvement of stakeholders. For example, roughly half of the action items cannot be credibly addressed without direct input from water and power customers. Other action items depend on the wisdom of rank-and-file employees, changes to legislation, or expert guidance from government management experts inside and outside of the Department of the Interior. We will seek help and support from all these sources."

He also explained, "Funding to carry out the tasks contemplated in the plan will be made available by reprioritizing existing activities... consistent with an absolute commitment to ensure that all activities vital to Reclamation's core mission, including ongoing operation, maintenance, and environmental compliance responsibilities, are unaffected. We anticipate that implementation of the



action items will result in significant improvements in the efficiency of Reclamation's management. This would ultimately translate into improved capacity to carry out all aspects of Reclamation's mission, including operation, maintenance, and environmental compliance." He concluded, "The significant investment of Reclamation staff time and resources is warranted. These 41 action items may well shape the future of Reclamation for years or even generations to come."

On May 23, the Senate Energy and Natural Resources Committee also held a hearing on the National Research Council (NRC) report, "Managing Construction and Infrastructure in the 21<sup>st</sup> Century Bureau of Reclamation" and the U.S. Bureau of Reclamation report, "Managing for Excellence: An Action Plan for the 21<sup>st</sup> Century." Senator Pete Domenici (R-NM) in announcing the hearing, said: "The NRC report provides a good overview of what changes will be required of Reclamation over the coming years. However, the NRC report and Reclamation's Action Plan are the beginning of a long process. There are serious challenges facing Reclamation that require a long, hard look, such as aging infrastructure and a growing population in the West. I fully intend to hold additional hearings to monitor Reclamation's implementation of the findings of the NRC report...."

Witnesses included: William (Bill) Rinne, Acting Commissioner, Bureau of Reclamation; Lloyd Duscha, Consulting Engineer, NRC; Dan Keppen, Executive Director, Family Farm Alliance; Diane Snyder, Executive Director, American Council of Engineering Companies of New Mexico; Scott Yates, Director, Wyoming Water Project, Trout Unlimited; and Bennett Raley, Esquire.

Bennett Raley, former Assistant Secretary of Interior for Water and Science, testified, "I believe that Reclamation's 'Managing for Excellence' represents a good faith and serious first step by the agency to respond to the challenges identified by the National Academy....[C]hange is never easy, and particularly so when the needed change threatens long held institutional biases. In today's fiscal reality, it is in the best interests of everyone for Reclamation to devote scarce federal dollars to tasks that others cannot perform, and for Reclamation to be able to supervise and provide accountability for public funds that are invested in federal projects while maximizing the role of other competent entities in the operation, maintenance and rehabilitation of the irreplaceable investment in water supply infrastructure in the West. Reclamation has a long and proud history of excellence. I am very proud to have been associated with Reclamation in my career. None of my remarks should be construed to be a criticism of Reclamation employees, or for that matter of Reclamation itself. The need for change does not mean that what came before was wrong or misguided. Sometimes, as is the case with Reclamation today, institutions must change to meet the evolving needs of the people they serve."

He articulated "10 Tests for Success" that will result in meaningful change: (1) Reclamation adopts a policy that project beneficiaries who pay for 50% or more of specific work can elect to use District personnel or private consultants for design, procurement, construction, and contract and construction management; (2) Reclamation uses "performance based" instead of "design based" standards for construction work; (3) standards for construction and operation and maintenance (O&M) used by Reclamation are based on an assessment of the relative risk, consequences of failure, marginal return, and are subject to appeal to a policy level; (4) Reclamation adopts Government Performance and Results Act (GPRA) goals that require transfer of O&M for an increasing percentage of Reclamation facilities to project beneficiaries; (5) Reclamation adopts GPRA goals that establish a minimum percentage of planning, design, procurement, construction and contract management to be performed by project beneficiaries or outsourced; (6) GPRA goals are incorporated into Senior Executive Service (SES) performance reviews; (7) "transparency" with ABC accounting at the project level is available to project beneficiaries by job classification and

specific task; (8) Reclamation adopts Scenario 2 or Scenario 3 from the NRC Report calling for outsourcing O&M or federal funding and local execution; (9) "rightsizing" with Reclamation's total workforce reduced by more than just the rate of attrition; and (10) personnel reductions at the Denver Technical Service Center (TSC) that are real and not achieved by reassignments to the Regions or reclassifications of existing job categories.

He observed: "I believe that many in Reclamation understand the seriousness of this effort and the need to make meaningful changes in Reclamation's institutional structure."

On July 10-11, the U.S. Bureau of Reclamation held the first in a planned series of three public meetings on its Managing for Excellence (MFE) Action Plan in Las Vegas, Nevada. WSWC staff attended and participated. The MFE Action Plan reads, "Reclamation's history of accomplishment includes marvels of engineering and construction which supply critical water and power to the now-vibrant Western United States. While these Reclamation structures stand as icons of rock-solid stability and constancy, the agency itself has, from its inception, experienced constant change.... It is time for Reclamation to change again."

Reclamation's challenge is how best to manage, develop and protect "water and related resources in an environmentally and economically sound manner in the interest of the American public." Its work is categorized under several major functional areas: (1) relationships with customers and other stakeholders; (2) policies and organization; (3) engineering and design services; (4) major repair challenges; (5) project management; (6) asset sustainment; (7) research and laboratory services; and (8) human resources and workforce. Some of the challenges include managing a capital infrastructure investment in water and power facilities estimated at \$250 billion in current dollars, financing major project repairs where water and power uses are unable to cover their share of the cost in the same year repairs are made, identifying critical personnel and competencies, and leadership succession planning. Approximately 75% of Reclamation's top leaders will be eligible to retire in the next five years.

This was a working meeting, with MFE teams presenting their work to date and asking those in attendance to comment on past, present and future tasks. A break out session on Action Item #19, "Adding Value to Major Operation and Maintenance (O&M) Repairs," asked stakeholders for their definition of "adding value," any experience with innovative methods or lost opportunities, suggestions for strengthening partnering relationships, and specific recommendations related to planning, design, procurement, contract administration, construction management, or cost reduction. Some of the feedback they received related to increasing vendible project outputs (traditional and non-traditional), as well as identifying potential additional project beneficiaries that may be willing to help repay project repair costs. However, changing statutory project purposes would require congressional action, and existing project beneficiaries may not be anxious to accept new partners.

The session on Action Item #28, "Project Title Transfer," asked participants for their thoughts about barriers to transfers and ways to encourage more transfers, including generic legislation that would set criteria for evaluating potential transfers and provide a more uniform structure for authorizing project transfers. There was an interesting discussion on the transfer of related water rights, and what consideration should be given project-related power users (who have paid out many projects) and recreation interests.

The plenary session covered issues related to BOR's workload analysis and "right sizing" for design, engineering, and construction efficiencies. Other discussion groups covered project

management, cost reporting, O&M planning, benchmarking O&M costs for water projects, and the use of federal and non-federal laboratory services. Not all of the Action Item Teams were ready to present their proposals for public comment. Reclamation plans more public meetings. Under an ambitious schedule, some policy and administration related items have already been completed, a number of items will be completed by the end of July, and most of the 41 action items are to be implemented by the end of December 2006. This \$10 million review effort will primarily be financed through existing resources by reprioritizing previously appropriated funds.

The second in a series of public workshops on the U.S. Bureau of Reclamation's Managing for Excellence (MFE) project was held in Salt Lake City on September 19-20, and WSWC staff attended. Reclamation leaders and water users discussed a variety of topics. Internal teams are working on a fast track to complete concept papers (papers for the various topics are complete) and seek public comment. For details, visit <http://www.usbr.gov/excellence>.

On November 13-14, WSWC staff attended the third in a series of public meetings on the Managing for Excellence program held in Sacramento, California. Newly confirmed Commissioner Bob Johnson welcomed participants, and reported that MFE is his "top priority." Mark Limbaugh, Assistant Secretary of Interior for Water, also attended and stressed MFE's importance in improving Reclamation's operations and decisionmaking processes. All five regional directors and several other senior Reclamation leads from Denver and the Washington, D.C. offices attended. Larry Todd, Deputy Commissioner, Policy Administration and Budget, gave an overview of progress to date.

The agenda included discussion of policy gaps and policy development, an overview of design and engineering services, alternative organizational work load scenarios, determining the need for major repairs and opportunities for adding value, project management, engineering standards, title transfers, Reclamation labs, financial status reporting, Reclamation Fund receipts and appropriations and relationships with customers, partners and other stakeholders. Three more meetings are planned for 2007. Reclamation is striving to become more "transparent" and "efficient," and "right-sizing" to meet its future water management role.

#### Reclamation Fund

With respect to the Reclamation Fund, Bob Wolf, Director, Program and Budget, explained that the unobligated balance is increasing mainly due to growth in on-shore federal mineral leasing receipts. Expenditures from the fund have declined for the Western Area Power Administration, but Reclamation's share has not declined significantly. The estimated balance at the end of FY2007 is \$7.27 billion, with FY2007 receipts estimated at \$2.24 billion and appropriations at \$919 million. This discussion was added to the meeting agenda at the suggestion of the Council.

#### Water 2025

On April 6, Senator Pete Domenici (R-NM) introduced S. 2561, a bill to authorize the Secretary of the Interior to make available cost-shared grants and enter into cooperative agreements, under the Water 2025 Program, to improve water conservation, efficiency, and management. He stated, "...my home State of New Mexico is facing one of the worst droughts in the past 100 years. Historic snow pack data indicates the 2005-2006 snow season is the worst in more than 50 years. Several river basins in New Mexico, including the Rio Hondo and Mimbres river basins currently have no snow pack. This fact is particularly troubling when one considers that we rely on spring run-off for our surface water. Moreover, lack of snow pack indicates that our reservoirs, already depleted after years of drought, will remain at alarmingly low levels...."

He continued, "The current drought illustrates how perilously close we are coming to having serious and widespread water shortages and the need to make more efficient use of the water we do have. The competing demands of agriculture, industry, municipalities and environmental needs have placed an enormous strain on available supplies of water. This is particularly true with respect to our interstate rivers that are governed by compacts. These interstate agreements require that a certain amount of water be delivered to downstream States. Meanwhile, enormous amounts of water are lost because of antiquated water infrastructure. In many instances, relatively cheap water infrastructure upgrades can minimize water losses.... For the past 3 years, Congress has made available efficiency and conservation grants through the Administration's Water 2025 program. The goal of this program is to make more water available in water-short river systems through infrastructure conservation and efficiency upgrades. The bill I introduce today would authorize the Water 2025 program. While not a panacea to our water woes, I believe that this legislation will help us maximize the water available to us during times of drought."

He concluded: "Ensuring adequate water supplies for the Southwestern United States is as important a matter as any I can contemplate. As Chairman of the Energy and Natural Resources Committee, which has jurisdiction over this legislation, I assure it will receive prompt Committee consideration." Rep. Heather Wilson (R-NM) introduced a bill in the House.

On April 19, Domenici and ranking member Jeff Bingaman (D-NM), hosted a Senate field hearing to look into the severe drought and associated water crisis facing New Mexico and the Southwest in Albuquerque. They intend to assess ongoing drought conditions, as well as legislative and technological initiatives that might alleviate escalating water shortages. The hearing included testimony on S. 2561 and research efforts being carried out by Sandia National Laboratories to address water scarcity, as well as assess the record low snow pack and drought conditions facing New Mexico.

Senator Domenici said, "The seriousness of the ongoing drought cannot be overstated. These dry days are just about the worst in a century and the ramifications of the drought are affecting everyone.... There is a pressing need now, not only in New Mexico, but in a majority of the Western states to address this problem." Bingaman added, "The drought is wreaking havoc on our crops and rangeland, and our state is again facing a potentially devastating wildfire season. The hearing we will have next week will help give us a more complete assessment of the ongoing drought in New Mexico and offer insights on what action is needed."

The witness list includes: Bruce Knight, Chief, Natural Resources Conservation Service; Mark Limbaugh, Assistant Secretary of Interior for Water and Science; John D'Antonio, New Mexico State Engineer and Interstate Stream Commission Secretary; José Otero, Middle Rio Grande Conservancy District; Arvin Trujillo, Navajo Nation Division of Natural Resources; and Mike Hightower, Sandia National Laboratories.

John D'Antonio, a WSWC member, testified: "New Mexico is currently suffering through one of the driest winters in the last 112 years, and in parts of the state, this is the driest year in recorded history. New Mexico's rivers and streams are expected to have extremely low flows because the snowpack conditions are the poorest since 1950. Also, the National Weather Service is predicting that dry conditions will continue throughout most of New Mexico for the remainder of the spring season. Drought conditions, in the near future, are not likely to abate...."

He also explained, "One of our significant issues is the delivery of surface water to irrigation districts in the Lower Rio Grande.... Texas threatened to sue New Mexico...and claimed groundwater diversions were interfering with Rio Grande Project water deliveries to El Paso Irrigation and Water Conservation District Number One.... New Mexico has had numerous discussions with Texas concerning the...historic administration of water rights which has not affected project deliveries and that improved efforts are being undertaken to ensure such deliveries continue unimpeded. However, drought coupled with the rate of development during the last 30 years has illuminated areas in need of attention.... In order to ensure our state utilizes its full entitlement and maximizes the beneficial use of its available water supply, we are undertaking major administrative changes. I have ordered metering of groundwater diversions in the Lower Rio Grande below Elephant Butte Dam. We are developing a more advanced water rights application analysis process to complement the completion of one of the most advanced models in the country for the conjunctive management of surface and groundwater sources...which requires the acquisition of new and improved technology."

He also testified, "The Department of Interior's Water 2025 initiative focuses in part on avoiding crises associated with western water management issues. [It] helps states such as New Mexico develop and implement strategies and put proper tools in place to better manage scarce water resources. This partnership will help nourish a healthy environment and sustain a vibrant economy by fostering cooperation and collaboration between all water users, especially during times of drought. The process of acquiring, developing, and implementing these tools is part of my Active Water Resource Management plan."

Chief Knight discussed the current status of drought in New Mexico and neighboring states. "Drought as a natural disaster is not easily recognized in its early stages. However, the longer it lasts the more detrimental its effects to natural resources and human communities.... The Snow Survey and Water Supply Forecasting Program...provides agricultural water users and other water management groups in the 11 Western States and Alaska with water supply forecasts to enable them to plan for efficient water management. The program also provides the public and the scientific community with data that can be used to accurately determine the extent of the snow accumulations and ultimately the surface water resource. Up to 80% of the stream flow in the Western United States is derived from melting snow pack, so accurate measurement is critical to those that depend upon water resources.... In the past 30 years, the NRCS has automated 715 of the 1,600 sites in the West. NRCS also operates three Soil Climate Analysis Network (SCAN) sites in New Mexico that monitor real-time soil moisture and temperatures."

#### Rural Water Supply Act

On July 27, the House Resources Committee's Water and Power Subcommittee, chaired by Rep. George Radanovich (R-CA), held a hearing on a number of bills, including S. 895 and H.R. 4418, both directing the Secretary of Interior to establish a program in the Reclamation States to provide clean, safe, affordable and reliable rural water supplies; and authorizing the use of federal loan guarantees to help secure private financing for rural water projects and major Reclamation project repairs and rehabilitation. Testifying in general support of such legislation were Dale Pierson, Rural Water Association of Utah, and Dan Keppen, Family Farm Alliance (FFA). Further, William Rinne, Acting Commissioner of the Bureau of Reclamation, testified suggesting positive changes, and Curtis Anderson, Deputy Administrator, Rural Development Utilities Programs, explained USDA's experience and expertise with loan guarantees and rural water supply development. The Council generally supports S. 895.

Mr. Pierson testified that expanding Reclamation's mission to develop rural water supplies is "the right step toward a solution to the water problem facing the rural west.... To broaden the scope of the Bureau to drinking water supplies is a bold and dramatic new initiative for western America - and one that is sincerely supported and welcomed by rural communities and families." Mr. Keppen qualified FFA's support saying, "The Alliance supports S.895's goals, but we have concerns.... S. 895 is intended to protect Reclamation's core activities by applying consistent engineering and economic standards to proposed rural (domestic) water supply projects that are currently authorized by Congress on an ad hoc basis.... Good intentions notwithstanding, the Alliance is concerned that this new program will compete with Reclamation's essential functions for scarce resources."

S. 895, to establish a rural water supply program administered by the U.S. Bureau of Reclamation was introduced by Senator Domenici in April 2005. The Senate passed S. 895 on November 16, 2005, and sent it to the House where an identical companion bill (H.R.4418) was introduced by Rep. Stevan Pearce (R-NM).

Duane Smith, WSWC Vice Chairman, testified in support of the bill at a May 2005 hearing. The WSWC testimony points out the bill includes no new construction authority. Future projects identified through an assessment authorized under the bill would have to be separately authorized by the Congress. In January 2006, then WGA Chair Janet Napolitano, Governor of Arizona, along with Governors Rounds and Schweitzer, wrote House Resources Committee Chairman Richard Pombo (R-CA) and Nick Rahall (D-WV) urging action on S. 895.

The WGA letter read: "Many rural communities in the West have come to the realization that their currently utilized sources of water are insufficient to meet the projected demands in the future. Insufficient water supplies, heightened by the impacts of the recent drought, served notice on most rural communities of the fact that water availability continues to define and circumscribe economic and environmental well being and quality of life. This is particularly true in many small rural communities, which often lack the ability to meet pressing water supply needs and federal safe drinking water standards and requirements without some assistance from state or federal sources."

"Several rural communities working with State and Federal agencies have developed plans that identify alternative water supply projects to meet the projected demands. The primary obstacle to rural communities pursuing these water supply projects is cost. Small rural communities face much higher costs per capita to develop water projects due to the lack of economies of scale available to larger communities." The governors support S.895 as "...the first step in assisting rural communities with planning and developing solutions to ensure an adequate long-term supply of water is available for their current and future needs." Moreover, Title II, cited as the Twenty-First Century Water Works Act, would authorize a new federal loan guarantee program for certain projects, which the governors describe as "a needed tool."

Also, the governors' letter observes: "States should play a key role in the development and establishment of guidelines and criteria for determining program eligibility and in selecting project priorities. Moreover, federal efforts should be coordinated with state and local watershed plans." The House Water and Power Subcommittee held a hearing on the bill on July 27, 2006.

The Administration generally supported the bill, but raised issues related to cost sharing, communities' capability to pay for projects and future operation and maintenance costs, particularly tribal communities. The Administration also believes small local desalination plants may be a cost

effective solution for some rural communities, as opposed to expensive pipelines from distant water sources. The Bureau of Reclamation is moving forward and planning program implementation, in anticipation of passage of S.895 or a similar bill.

The House passed S. 895 on December 6, by voice vote, as amended, under a motion to suspend the rules. Reclamation was particularly interested in the new federal loan guarantee authority under Title II. It will provide a needed tool to help finance necessary repairs to Reclamation projects that are operated by non-federal entities which are responsible for maintenance costs but are unable to access private financial markets due to the fact that they do not own the projects and therefore can not provide security for loans for major repairs. It limits guarantees by the Secretary to 90% of a project's cost and requires amortization of the guarantee within 40 years.

It was signed into law by President Bush on December 22. P.L. 109-451 directs Interior to identify opportunities for, plan the design of, and oversee the construction of water supply projects for small communities and rural areas. Projects that are recommended by the Secretary must be authorized by the Congress. Under Title II, it also directs the Secretary to develop and publish criteria for determining the eligibility of a rural water supply or reclamation project for financial assistance.

## **Clean Water Act**

### *Good Samaritan*

On June 14, Senate Environment and Public Works Committee Chairman James Inhofe (R-OK) held an oversight hearing on S. 2780, which he introduced at the Administration's request to address liability under the Clean Water Act for clean up of abandoned hardrock mining sites. He said, "We've come here today to find common ground as to how exactly liability fears are causing Good Samaritans to walk away from cleaning up abandoned mines. It is estimated that there are over 500,000 abandoned hardrock mine sites littering our country and the Western Governors' Association estimates that nearly 20 percent of them are posing significant risks to the waterways into which they discharge. In light of the potential magnitude of the problem, ...we must broadly define a 'Good Samaritan' so that as many innocent parties as possible can participate while taking necessary precautions to ensure that those who may have had any role in the mining of these sites are held legally and financially accountable. No one here today proposes to violate the polluter pays principal in which we all so firmly believe."

Senators Wayne Allard (R-CO) and Ken Salazar (D-CO) both testified on separate legislation they have jointly introduced to address the problem (S. 1848). EPA Administrator Stephen Johnson and others also testified in support of the legislation. The Western States Water Council and Western Governors' Association support a legislative fix.

However, Velma Smith, National Environmental Trust, urged caution. "We would also remind you that while fear of liability may, in some cases, give pause to non-mining parties who would otherwise venture into mine cleanup, that pause, in and of itself, may not be a bad thing when it comes to cleaning up these difficult messes. Mining sites can be not only difficult to diagnose but also enormously difficult to cure. Entered upon without solid information, with poor design or with faulty execution, cleanups can and have gone terribly wrong. Finally, we urge you to consider that liability for both previous operators and land owners is an important factor that has been driving many cleanups.... If Congress reaches too broadly to encourage the cleanup of the most easily

remedied mine sites, it will put at risk the current liability leverage.... And if a Congressional response brings remining operations into the definition of "Good Samaritan"...you may end up...removing normal, for-profit operations, which nearly always take place in old mining districts, from existing regulatory requirements."

### Hydropower Licensing - Section 401 Certification

#### *Tacoma v. Federal Energy Regulatory Commission*

On August 22, the U.S. Circuit Court of Appeals for the District of Columbia handed down its decision in *Tacoma v. FERC*, a 24-year dispute over relicensing a hydropower project in Washington State on the Olympic Peninsula. The City of Tacoma owns and operates the Cushman Project, which sits on the North Fork of the Skokomish River and part of the Skokomish Tribe's reservation. The project was first licensed in 1924, and the Federal Energy Regulatory Commission (FERC) relicensed it in 1998. FERC imposed many conditions designed to protect the environment and remedy past damages, as well as restore the fishery to which the Tribe has treaty rights. Tacoma diverts virtually all of the water in the North Fork to maximize hydropower generation (48.6 megawatts). The project includes two dams and reservoirs. The largest is located within the boundaries of the reservation. Though Tacoma owns the land, an access road and transmission lines cross the reservation. A "minor part license" expired in 1974, and Tacoma sought a "major project license" to cover all its facilities. Due to repeated delays, FERC issued annual renewals of the existing license, under which the city operated the project for 24 years.

FERC finally concluded the review process in 1998 after addressing state water quality certification under Clean Water Act (CWA) §401(a), state "concurrence" under the Coastal Zone Management Act, state and federal fish and wildlife agency consultation under the Federal Power Act §10(j) and other matters. FERC issued a 40-year license, with conditions designed to protect and restore the environment, fish populations and otherwise "mitigate the effect of the project on the Tribe's reservation." FERC rejected Interior's §4(e) conditions to protect the purposes for which the Tribe's reservation was created, but did require a minimum flow of 240 cfs (compared to 60 cfs being released in the past, and compared to the Tribe's historic flow estimate of about 800 cfs). This partially met Interior's conditions. Several parties petitioned for rehearing, with Tacoma asserting the new conditions made project operations more costly than the power generated. FERC, in a series of orders, denied several petitions, allowed Tacoma to continue operating under its old license pending judicial review, and let Tacoma defer its final decision as to whether or not to accept or reject the new license until after completion of the appeal process.

Several petitions for review were filed with the Court of Appeals, which were remanded without any decision on the merits because the subsequent listing of two salmon species under the Endangered Species Act necessitated consultations between FERC and the National Marine Fisheries Service (NMFS), which the Court anticipated might result in significant license changes. Consultation with the U.S. Fish and Wildlife Service over bull trout effects also added to delays. In December 2003, FERC ordered a fact finding hearing before an administrative law judge (ALJ) in an effort to move the matter forward. The judge recommended an interim minimum water release of 240 cfs to benefit the endangered salmon. In March 2004, the Services issued final biological opinions (BiOps). In June 2004, FERC amended the Cushman license, adding specific provisions from the BiOps, and in the same order partially lifted its stay, requiring a 240 cfs minimum flow. FERC made further minor amendments to the license in February 2005, and denied a petition for rehearing.



Several petitions challenging FERC's orders were consolidated on appeal before the circuit court, which granted a stay of the 240 cfs flow requirement, allowing Tacoma to continue to operate the project as it had for about 80 years. The city continued to argue such a minimum flow requirement would force it to shut down the project. The Tribe, intervening, argued Tacoma has reaped huge profits, while "ignoring the devastating impact" on the Tribe's traditional lifestyle. The Tribe also challenged FERC's failure to include Interior's conditions to protect their reservation under §4(e) of the Federal Power Act (FPA). FERC rejected the conditions because they "were not timely filed," though the FPA does not indicate what, if any, time limitations apply. Interior did submit a letter complaining FERC's 60-day time line was "unworkable," given the complexity of the project, and promised to submit preliminary conditions within two years, which it did, and final conditions nine months later.

The circuit court concluded: "FERC exceeded its statutory authority by placing a strict time restriction on responsibilities Congress delegated to other federal agencies. The FPA provides that licenses 'within any reservation' 'shall be subject to and contain such conditions as the Secretary...shall deem necessary for the adequate protection...of such reservation....'" The court continued, "The FPA gives FERC no discretion in this regard.... FERC can no more dictate to Interior when Interior should complete its work than Interior can dictate to FERC when FERC should do so. Here, FERC took... a full 24 years - to issue a license to Tacoma." While only the access road and transmission line are "within" the reservation, the court determined "this is sufficient" to require Interior's approval. Moreover, while FERC concluded Interior's authority was limited to imposing conditions to mitigate this relatively small impact - the court determined that "...so long as some portion of the project is on the reservation, the Secretary is authorized to impose any conditions that will protect the reservation."

Next, the Tribe argued FERC failed to ensure that the requirements of CWA §401(a) were met. The Washington Department of Ecology issued a conditional certification, which Tacoma appealed to the state's Pollution Control Hearings Board, and a new conditional certification was issued - but Ecology was unable to produce records showing that it gave public notice (as the CWA requires) or held a hearing before issuing either certification. The court observed, "In most cases, if a party seeks to challenge a state certification issued pursuant to section 401, it must do so through the state courts. The reason for this rule is plain enough. The [CWA] gives a primary role to states 'to block...local water projects' by imposing and enforcing water quality standards that are more stringent than applicable federal standards.... Therefore, the decision whether to issue a section 401 certification generally turns on questions of state law. FERC's role is limited to awaiting, and then deferring to, the final decision of the state. Otherwise, the state's power to block the project would be meaningless...."

However, the court added, "If the question regarding the state's...certification is not the application of state water quality standards but compliance with the terms of section 401, then FERC must address it.... [W]ithout that certification, FERC lacks authority to issue a license. This obligation does not require FERC to inquire into every nuance of the state law proceeding, especially to the extent doing so would place FERC in the position of applying state law standards, but it does require FERC at least to confirm that the state has facially satisfied the express requirements of section 401.... Otherwise, FERC has no assurance that the certification the state has issued satisfies section 401, and in the absence of such an assurance, it has no authority to grant a license."

Of particular interest, the Tribe also argued that Tacoma "lacks water rights for the water it uses in connection with the Cushman Project." In 1993 and again in 1994, Ecology wrote FERC in detail explaining that Tacoma had mischaracterized the "extent of its state water rights." However,

FERC replied that Tacoma had applied for additional water rights and that "section 27 of the FPA...deprived FERC of authority to adjudicate issues related to state water rights." The Tribe then asked FERC to include in its license "an article requiring Tacoma's compliance with its existing state water rights to the satisfaction of...Ecology or a court of competent jurisdiction, including if necessary... restricting its water usage to match its authorized amount." The court agreed with FERC that such an article was unnecessary. The court explained, "If FERC lacks power to 'affect or...interfere with' state water rights, then the license FERC issued for the Cushman Project does not (and can not) exempt Tacoma from meeting its water rights obligations under state law.... The Tribe argues that FERC, by issuing the license, has 'condoned Tacoma's blatant violation' of state water rights law. It cannot under section 27."

For its part, Tacoma argued that with the conditions imposed the project is uneconomic (with a negative net benefit of \$2.06 million annually) and the license amounts to a de facto decommissioning, in violation of FPA §14 and §15. The court observed that when a license to operate a hydroelectric project expires, there are several options. For one, FERC may decide not to issue a new license, however, "the Act is silent with respect to the disposition of the project works and any other remedial measures that might be necessary to restore the environment. For example..., failure to maintain a dam after a project ceases operations would lead to the gradual deterioration of the dam's structural integrity followed by a possible catastrophe (and huge liability for the landowner).... On the other hand, the project's former operator may not want to bear the cost of maintaining the dam when it no longer receives revenues from the project, and if the former operator removes the dam, homes and businesses that have come to rely on the presence of the dam may lose much of their value." This is a major concern for lakeside property owners.

The court continued, "FERC could, of course, address these issues at the time of licensing by imposing appropriate license conditions..., but it is not clear whether, in the absence of express license conditions, FERC has the authority to impose obligations and costs on a former licensee." In 1995, FERC published a "policy statement" claiming such authority. "In conclusion," said the court, "we find persuasive FERC's argument that Congress implicitly extended to FERC the power to shut down projects either directly, by denying a new license, or indirectly, by imposing reasonable and necessary conditions that cause the licensee to reject the new license. We have no cause to decide in this case whether, and in what circumstances, FERC can impose decommissioning obligations or costs on a former licensee."

The court also addressed challenges under the Endangered Species, Coastal Zone Management Act, National Historic Preservation Act and National Environmental Policy Act. In the end, the court denied the petitions in part, granted them in part, and remanded to FERC, without vacating the license, but vacating its stay on minimum streamflow requirements.

### Jurisdiction over Wetlands

#### *Rapanos and Carabell*

On June 19, a divided U.S. Supreme Court (5-4) narrowed the Corps of Engineers' and Environmental Protection Agency's jurisdiction over wetlands, which both agencies had defined broadly under the Clean Water Act (CWA). Specifically, the Court ruled that the Corps over extended its authority under CWA Section 404 to require a permit to discharge dredge or fill material into "the waters of the United States" in the *Rapanos* and *Carabell* cases. The Court vacated the Sixth Circuit decision, which found a "significant nexus" existed between Lake St. Clair and both

the Carabell wetlands, located about a mile away, as well as with the Rapanos property, located about 20 miles from the lake. The Circuit Court had upheld federal jurisdiction over the wetlands which are connected to traditional navigable waters by means of drainage ditches and non-navigable creeks, as well as wetlands separated from a drainage ditch by a berm.

Justice Scalia wrote the majority opinion. Justices Thomas, Alito, and Chief Justice Roberts joined. The plurality held that “the waters of the United States” did not include “ordinarily dry channels through which water occasionally or intermittently flows.” Rather, jurisdiction only extends to “relatively permanent bodies of water connected to traditional interstate navigable waters,” or where a wetland is significantly connected on the surface with such a body of water, making it “difficult to determine where the ‘water’ ends and the ‘wetland’ begins. A wetland may not be considered adjacent to remote waters of the United States based on a mere hydrologic connection.”

Chief Justice Roberts also authored a concurrence in which he criticized the Corps for overextending its jurisdiction. “Rather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency.” Additionally, the Chief Justice lamented the absence of a clear majority opinion on CWA jurisdiction, stating that lower courts and regulated entities will now have to feel their way on a case-by-case basis.”

Justice Kennedy also concurred with the majority, casting the decisive vote, but he concluded that the Sixth Circuit correctly used the “significant nexus” test. However, while Kennedy was critical of the plurality’s “unduly dismissive” opinion, he tipped the scales in favor of their decision to remand, finding the Sixth Circuit had not “consider[ed] all the factors necessary to determine that the lands in question had, or did not have, the requisite nexus.”

The four dissenters would have upheld the broad federal jurisdiction claimed by both agencies and warned that the plurality’s ruling could threaten wetlands and the environment.

In a July 26 interview just before leaving office, Ann Klee, General Counsel, U.S. Environmental Protection Agency (EPA), outlined the guiding principles EPA has pulled from the U.S. Supreme Court’s *Rapanos/Carabell* decision. She said EPA believes that *Rapanos* will allow the agency to assert federal Clean Water Act jurisdiction over wetlands using either the plurality’s “continuous surface connection” test, or the “significant nexus” test that Justice Kennedy articulated in his concurrence. EPA’s interpretation of *Rapanos* is based on “Supreme Court precedent [which EPA believes] clearly allows [them] to extract principles or tests that would garner any five votes of any five justices.” EPA and the Corps are currently working on joint policy guidance outlining their CWA jurisdiction over wetlands. However, during the interim period, Ms. Klee urged landowners to work closely with EPA or the Corps “to evaluate whether or not [their] wetland has a significant nexus to a downstream, navigable-in-fact water.”

However, EPA’s “guiding principles” were not adopted in the first decision to cite *Rapanos* since the case was decided. Rather, in *U.S. v. Chevron Pipe Line Co.*, the U.S. District Court for the Northern District of Texas relied on the plurality’s exclusion of intermittent and ephemeral streams from “waters of the United States” to hold the U.S. did not have CWA jurisdiction to fine Chevron for spilling 3,000 barrels of oil into a dry creek bed. Deeming Justice Kennedy’s “significant nexus” test “vague,” the district court followed the Fifth Circuit’s holding that a “significant nexus” exists

if “the site of the farthest traverse of the spill, is navigable-in-fact or adjacent to an open body of navigable water.”

The Department of Justice (DOJ) filed two motions for remand on July 31st, requesting that *Rapanos v. U.S.* be remanded to the 6th Circuit Court of Appeals, and that *Carabell v. U.S. Army Corps of Engineers* be remanded to the Corps. Some, including Earthjustice’s Joan Mulhern, believe that on remand a “significant nexus” will be found between the two wetlands at issue and the watersheds and navigable waters in which they are located, and that this finding will be upheld on appeal. Richard Lazurus, Georgetown University Law Professor, disagrees: “Scalia makes clear that *Rapanos* and *Carabell* should win on remand.... Kennedy makes it absolutely clear that under his test *Rapanos* and *Carabell* can lose on remand. [This is going to cause] a lot of confusion for the lower courts because Justice Kennedy...couldn’t affirm.”

On August 1, the Senate Environment and Public Works Committee’s Fisheries, Wildlife and Water Subcommittee held a hearing on *Rapanos v. U.S.* and the 4-1-4 Supreme Court decision redefining the scope of federal jurisdiction over wetlands under the Clean Water Act. The Environmental Protection Agency and U.S. Army Corps of Engineers have issued intermediate guidance to their field staff, instructing them to continue processing CWA §404 permits, but to “temporarily delay making jurisdictional calls.” EPA and the Corps are working on joint guidance “clarifying CWA jurisdiction.” While the Committee agrees that the “failure to swiftly act to clarify the scope and meaning of the *Rapanos* decision will result in a costly quagmire of litigation,” they disagree on whether or not Congress should clarify the scope of federal CWA jurisdiction, or whether the agencies should redefine the scope of their jurisdiction through a rulemaking. Legislation to clarify CWA jurisdiction (S. 912 and H.R. 1356), is not currently Chairman James Inhofe’s (R-OK) top priority.

In his opening statement, Senator Inhofe argued that federal wetlands jurisdiction stems from the federal Commerce Clause power over interstate navigable waters, noting: “[T]hose who seek to expand federal jurisdiction must do so within the bounds of the Constitution.” Moreover, he cautioned against infringing on property owners’ development rights. He explained, “How we define ‘waters of the U.S.’ is critical to protecting the rights of citizens, local governments and states to regulate the use of their lands. I hope the EPA and the Corps will issue a new definition consistent with the *Rapanos* decision that fully accounts for the constitutional limitations on their authority.”

Senator Lisa Murkowski (R-AK) suggested the Congress allow the agencies to clarify the scope of their own jurisdiction over wetlands through rulemaking, noting: “[T]here are times when allowing another entity to make the first move can be productive....,” and “I believe this is one of those times.” Additionally, she cautioned against too powerful a federal role, pointing out that Alaska’s Constitution protects wetlands by requiring “sustainable use” management of resources. The resulting pollution controls are among the nation’s strictest. Notably, Alaska’s Constitution was drafted “in response to decades of federal mismanagement.”

Senators Hillary Rodham Clinton (D-NY) and James Jeffords (I-VT) disagreed, arguing that *Rapanos* was harmful to wetlands conservation and contrary to Congressional intent, calling for Congress to clarify the CWA. In addition, they have joined Senators Frank Lautenberg (D-NJ), Barak Obama (D-IL) and Russ Feingold (D-WI) in signing a letter asking the Bush Administration to rescind its “no net loss” wetlands policy. “We urge you to remove this nation’s biggest obstacle to wetlands protection by rescinding the guidance you issued which eliminates protections for wetlands.” The letter advocates an “overall increase.”

John Cruden, Deputy Assistant Attorney General, Environment and Natural Resources Division (ENRD), U.S. Department of Justice, discussed ENRD's extensive CWA docket and the ramifications of the *Rapanos* decision. ENRD has "convened an internal group of experienced attorneys to [assemble and review] cases which could be impacted by the decision." He explained that ENRD would only take legal positions consistent with the *Rapanos* decision. As for the scope of its wetlands jurisdiction, DOJ is asking courts to adopt the view of either the plurality or Justice Kennedy's concurrence. He added, DOJ will continue to cooperate with the states.

Another witness, Jonathan Adler, Professor of Law, Case Western Reserve University School of Law, argued that despite the divided opinion, *Rapanos* did resolve much of the confusion surrounding the CWA. Specifically, when "...viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds," the *Rapanos* holding requires a "significant nexus" between a wetland and navigable waters to trigger federal jurisdiction, clarifying that a "mere hydrologic connection" by itself is insufficient. Adler urged the agencies to limit their jurisdiction to "areas where there is an identifiable federal interest," and not discourage "state and local governments from adopting environmental protections where such efforts would be worthwhile." He believes a federal incentive program would better promote wetlands conservation.

#### *Solid Waste Agency of Northern Cook County*

A rider on H.R. 5386, the FY2007 Interior and Environment Appropriations Act passed by a 222-198 margin, prohibits EPA from spending money to implement 2003 policy guidance related to jurisdiction over isolated wetlands under the U.S. Supreme Court's 2001 decision in *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers*. Rep. James Oberstar (D-MN) offered the amendment to stop EPA from continuing to implement or enforce a Joint EPA - Army Corps of Engineers' Memorandum published in the *Federal Register* on January 15, 2003 (68 FR 1995). The guidance was issued along with an Advance Notice of Proposed Rulemaking and requested comments, but no new rule has yet been promulgated. The memo stated: "In light of *SWANCC*, field staff should not assert CWA jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis... for asserting... jurisdiction rests on any of the factors listed in the 'Migratory Bird Rule.' In addition, field staff should seek formal project-specific HQ approval prior to asserting jurisdiction...based on other factors...."

#### *National Pollutant Discharge Elimination System*

##### *Catskill Mountains Trout Unlimited v. New York*

The Second Circuit Court of Appeals issued a ruling on June 13 in an appeal by New York City (*Catskills II*) of a district court ruling assessing a \$5.7 million fine for failing to obtain a National Pollutant Discharge Elimination System (NPDES) permit for an interbasin transfer of water through operation of the Shandaken Tunnel. In its appeal, New York City asked the court to reconsider its earlier ruling in *Catskills I* that the discharge of turbid water from the tunnel into Esopus Creek required a permit. While reviewing its earlier ruling in light of EPA's 2005 interpretation of the applicability of NPDES permits to water transfers, the court declined to defer to EPA's determination that water transfers do not require NPDES permits, citing two U.S. Supreme Court cases for the proposition that agency interpretation is only entitled to deference according to its "persuasive power." (451 F.3d 77; 2nd Cir. 2006)

In *Catskills I*, the court held that the City was required to have an NPDES permit because it was effecting an interbasin transfer, as opposed to an intrabasin transfer. In *Catskills II*, the court relied on *Miccosukee* to reaffirm its position that while intrabasin transfers may not require NPDES permits, interbasin transfers do require permits because they add pollutants from one body of water into another distinct and separate body of water. The court also rejected the City's claim that requiring a permit would essentially ban the City's transfer of water from the reservoir to the creek. The court concluded that the NPDES permitting system is flexible enough to allow transfers.

In regard to the \$5.7 million penalty, the Court of Appeals deferred to the factors used by the district court to calculate the amount, but found a mathematical error and remanded the matter. On August 25, the Second Circuit Court of Appeals rejected NYC's petition for rehearing in the case.

Amicus briefs in New York City's petition for cert to the Supreme Court were due December 27. NYC appealed on November 20. The National Water Resources Association (NWRA) has joined as an amici supporting NYC's position, and urged others to join to show the geographical scope and breadth of the impact of such an adverse decision. "Imagine needing an NPDES permit for every water transfer you do," said Peter Nichols of Trout, Raley, Montañó, Witwer & Freeman.

The following responded: the Albuquerque Bernalillo County Water Authority, New Mexico; Arizona Department of Water Resources; Association of California Water Agencies; Central Arizona Water Conservancy District; City of Aurora, Colorado; City of Boulder, Colorado; City of Colorado Springs, Colorado; Colorado Water Conservation Board; Denver Water Board, Colorado; Fremont Madison Irrigation District, Idaho; Idaho Water Users Association; Metropolitan Water District of Salt Lake and Sandy, Utah; Northern Colorado Water Conservancy District; Pioneer Irrigation District, Idaho; Southeastern Colorado Water Conservancy District; Western Urban Water Coalition; and Western Coalition of Arid States.

*Friends of the Everglades v. South Florida Water Management District*

In a suit brought by the Friends of the Everglades and Miccosukee Tribe to enjoin the South Florida Water Management District (SFWMD) from backpumping pollutant-laden runoff from canals into Lake Okeechobee, Federal District Court Judge Cecilia Altonaga ruled that "...water transfers between distinct water bodies that result in the addition of a pollutant to the receiving navigable water body are subject to the NPDES [National Pollutant Discharge Elimination System] permitting program." The judge found that the plain language of the Clean Water Act defines a discharge requiring a NPDES permit to include "any addition of any pollutant to navigable waters from any point source" and that SFWMD's S-2, S-3 and S-4 pumps are point sources that move water from the canals to the lake, which are both distinct "navigable waters" of the United States. The Tribe in a separate case that went to the Supreme Court challenged the operation of pump S-9. The Court remanded that case for further factual proceedings over whether or not the transfer of water was actually between water bodies that are separate and distinct.

The court recognized that EPA has proposed a rule that explicitly excludes water transfers from regulation under the NPDES program (71 FR 32887), and defines transfers as the conveyance of water between waters of the United States "without subjecting the water to intervening industrial, municipal, or commercial use." However, the court concluded, "No agency interpretation or court order for that matter can alter the unambiguous congressional intent expressed in a statute and the Court thus rejects the interpretation proposed by EPA." The district court added that both the Supreme Court and First Circuit noted "a holding that the NPDES program does not apply to water

transfers would result in a scheme where a person could pump the most polluted waters into the most pristine waters without a NPDES permit.”

Citing the Supreme Court’s *Miccossukee* decision, the court observed that water transfer activities only require a NPDES permit if they transfer water (and pollutants) from one body of water to another “meaningfully distinct” body of water. Further, the Court rejected the argument that NPDES permits are not required where the entity that controls the point source does not add any pollutant to the water. It held that the CWA definition of point source “makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to navigable waters, which are, in turn, defined as the waters of the United States.” Regarding the “unitary water” theory, that all waters are waters of the United States, and therefore not “distinct,” the court did not, “at first glance, view the... theory favorably...” but “ultimately declined to resolve the question as it had not been previously raised by the parties.” Therefore, the Court did not determine whether or not a transfer of water “unaltered” from one navigable water body to another requires an NPDES permit, but in vacating the lower court’s decision, stated that “...the unitary waters argument will be open to the parties on remand.”

Regarding differing circuit court opinions, Judge Altonaga determined they “are not in direct conflict with each other and are certainly reconcilable.” The court draws a distinction between the *Gorsuch* and *Consumers Power* cases involving reservoir releases, and hydropower project diversions, where the water is returned to the same body of water - and the *Dubois* and *Catskill I* and *II* cases, involving the transfer of water from one body of water to another clearly distinct and wholly separate body of water. The Supreme Court has not defined a precise test by which courts should determine whether two bodies of water are “meaningfully distinct.” Neither did Judge Altonaga attempt to articulate a precise test, but based on the evidence presented, she held Lake Okeechobee and the drainage canals to be “meaningfully distinct.” She did list ten factors in support of her conclusion: (1) the waters are separated by a physical barrier (a dike); (2) historically the waters generally flowed south naturally (while the pumpback was to the north); (3) today, the water generally continues to flow south; (4) the waters are chemically different; (5) there are biological differences; (6) the man-made canals were cut into bedrock, while the Lake is a natural bowl-shaped water body; (7) a visible plume may be observed when water is backpumped into the Lake; (8) the backpumping of canal water has a negative impact upon the Lake; (9) under the Clean Water Act the Lake is a Class I water body and the canals are Class III; and (10) the waters pumped would not have otherwise entered the Lake.

The district court took considerable care in addressing federalism concerns and arguments that Congress clearly intended that the CWA not encroach upon the states' ability to allocate water within their jurisdiction. “It is beyond dispute that the CWA has, to the maximum extent possible, left water allocation decisions to the states.” However, the court quoted Senator Malcolm Wallop, the author of Section 101(g) as saying, “The requirements of section 402 and 404 permits may incidentally affect individual water rights.... It is not the purpose of this amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations.”

Judge Altonaga, mindful of the broader implications of her decision, recognized the evidence presented concerning thousands of water transfers in western states and the crippling implications should states’ lose control over their own waters. She noted the Supreme Court in *Miccossukee* did not dismiss that argument out of hand, but rather suggested that in order to prevail, defendants would

have to: (1) demonstrate that the water transfers are allocative in nature; and (2) show that permitting the transfers would prohibitively raise states' costs of water distribution. She said, "Here, Defendants have failed to demonstrate either element.... This is not to suggest that backpumping has no impact on the State's allocation decisions. Water that reaches Lake Okeechobee may later be used to supply water for drinking or irrigation. Nevertheless, the Supreme Court and Congress have made clear that such incidental effects are both anticipated and acceptable aspects of the NPDES permitting program.... Congress intended an accommodation.... Such accommodations are best reached in the individual permit process." She cited the Second Circuit's finding in Catskill II that "the flexibility built into the CWA and the NPDES permit scheme...will allow federal authority over quality regulation and state authority over quantity allocation to coexist without materially impairing either."

Judge Altonaga deferred final judgement, as it remained unclear what the appropriate nature of any prospective relief should be granted the plaintiffs, as there is no dispute that were SFWMD to cease its backpumping massive flooding would result. The judge rather required the parties to submit a proposed joint scheduling report for additional proceedings to consider the plaintiffs' request for injunctive relief no later than December 22. She said, "The problems facing Lake Okeechobee and the Everglades are far from simple. No one suggests that requiring the SFWMD...to obtain a NPDES permit...will solve these problems or even substantially contribute to a solution."

Diane Carroll, an attorney for the Miccosukee tribe declared, "This is a great victory for the environment, Lake Okeechobee, and the Miccosukee Tribe." Preston Robertson, Vice-President of the Florida Wildlife Federation, another one of the plaintiffs, said, "Pumping polluted agricultural and urban runoff has been destroying Lake Okeechobee for years." David Guest, an Earthjustice attorney representing the Federation, opined, "This is a big victory not just for Lake Okeechobee but for drinking water sources around the United States.... The finding of the judge was that the statute, the Clean Water Act, has a plain meaning. The meaning is that backpumping like this - water transfers that carry pollutants - require permits." He continued, "I think this is a dagger in the heart of the proposed EPA rule.... Today's decision should end EPA's illegal and misguided attempts to circumvent the law and allow these polluted water transfers without meeting Clean Water Act pollution control safeguards."

Nicolas Gutierrez, a member of the SFWMD Board, observed, "The judge's ruling is especially troubling in that it creates a definite distraction from our forward momentum with Everglades restoration. We will have to refocus our efforts away from progress and action in order to, instead, comply with mandatory and time-consuming permit processing."

#### Total Maximum Daily Loads

The District of Columbia Water and Sewer Authority (WASA) has petitioned the United States Supreme Court to decide the meaning of the word "daily" in the context of "total maximum daily load" measurements, required by Section 303(d) of the Clean Water Act (CWA) for waters that fail to meet state water quality standards. WASA is appealing a U.S. Court of Appeals for the District of Columbia decision that the word "daily" means that Total Maximum Daily Loads (TMDLs) must be measured in 24-hour increments. The lawsuit began when the District of Columbia (DC) found the Anacostia River was in violation of water quality standards and the Environmental Protection Agency (EPA) approved two TMDLs, one measured on an annual basis and the other measured on "seasonal average daily concentrations." Subsequently, Friends of Earth (FOE) filed suit in district court, arguing that the TMDLs must be measured over a 24-hour period, and that EPA acted arbitrarily by approving the annual and seasonal measurements.



The district court granted WASA and EPA's motions for summary judgment, and FOE appealed to the DC Circuit. On appeal, the Circuit reversed, holding EPA was confined to the plain meaning of the language in the CWA, which reads: "Each state shall establish...the total maximum daily load, for those pollutants which the Administrator identifies...as suitable for such calculation." According to the Circuit Court, "daily" means EPA must approve TMDLs based on 24-hour measurements. Additionally, "Because EPA has found all pollutants...suitable for the calculation of total maximum daily loads," none of the pollutants in the Anacostia River were exempt from this requirement.

In its petition for writ of certiorari, WASA asks the Supreme Court to reverse the Circuit's decision for four reasons. First, the "plain meaning" interpretation of the CWA conflicts with the principles of statutory construction, as the Circuit took the word "daily" out of context to reach its decision. WASA points to the Supreme Court's decision in *Brown & Williamson*, where the Court held that tobacco did not fit within the meaning of the word "drug," and thus could not be regulated by the Food and Drug Administration.

Second, WASA asserts the DC Circuit's decision creates an impermissible conflict with the 2nd Circuit, which in a similar case held it would be "absurd" to read "daily" as requiring a 24-hour measurement. Rather, the 2nd Circuit held that TMDLs could be "expressed by another measure of mass per time, where such an alternative measure best serves the purpose of effective regulation of pollutant levels in waterbodies."

Third, the decision "could preclude implementation of substantial portions of [the CWA]." Specifically, CWA §402(q) requires discharges to conform with Combined Sewer Overflow Control Plans (CSOCP), but 24-hour TMDLs would preclude various CSO alternatives and options. For example, a "basic element of the CSO Policy's permit provisions is...that permits issued after [Long-Term CSOCP] development include numeric performance standards..., based on average design conditions." The Circuit dismissed the CWA §402(q) argument as "post-enactment legislative history," in direct conflict with *Brown & Williamson* the Supreme Court supported its finding with "several statutes governing tobacco products enacted subsequent[ly]."

Lastly, WASA asserts that the decision will lead to "absurd" results, and cause program disruption, impacts to private property, technical difficulties, and result in lower water quality.

### Pesticides

On November 20, Stephen Johnson, EPA Administrator, signed a final rule describing two circumstances under which National Pollutant Discharge Elimination System permits are not required to apply pesticides to waters of the United States. "This clean water rule strengthens and streamlines efforts of public health officials and communities to control pests and invasive species while maintaining important environmental safeguards," said EPA Assistant Administrator for Water Ben Grumbles. "The rule reflects EPA's long-standing policy that an NPDES permit is not required where application of a particular pesticide to, over, or near waters of the United States is consistent with requirements under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)."

### Section 106

On December 30, the Environmental Protection Agency announced plans to change the way it allocates water pollution control program grants under Section 106 of the Clean Water Act. The

FY2006 EPA appropriation included an increase of \$18.5 million for water quality monitoring. This is over and above some \$200 million appropriated annually to support state, tribal and interstate agencies' water pollution control programs, including the development and implementation of ground water protection strategies. EPA allocates the funds through a prescribed allotment formula. However, the President's FY2006 budget specifically requested an increase for enhanced monitoring activities, particularly for statistically-valid assessments of water quality nationwide and strengthening state and interstate monitoring programs. The Congress' FY2006 conference report accompanying EPA's appropriation earmarked \$18.5 million to enhance monitoring efforts. EPA determined that if this amount were included in the general state and interstate allotment formulae, only a small number of states and interstate agencies would actually receive a sufficient increase to strengthen their water quality monitoring activities.

EPA is amending its regulations to separately allot those funds earmarked for specific water pollution control elements, as determined by EPA based on a review of the President's budget, conference reports, and/or appropriation acts. Under the revised process, EPA will be better able to target additional funds to carry out work in priority areas such as water quality monitoring. In developing this allotment formula, EPA will consult with the States and interstate agencies in determining the most appropriate mechanism to implement the alternative allocation formula, based on the extent of pollution. EPA intends to exercise its discretion and use this alternate allotment formula only in situations where the appropriations process has indicated that funds should be used for a specific purpose. The remaining Section 106 funds will continue to be allotted in accordance with applicable allotment formulae.

By this action, EPA amends its regulations (40 CFR 35.162) by adding section (d) to read as follows: "Alternative allotment formula - Notwithstanding paragraphs (b) and (c) of this section, if the Administrator determines that a portion of the funds appropriated under the Water Pollution Control grant program should be allotted for specific water pollution control elements, the Administrator may allot those funds to States and interstate agencies in accordance with a formula determined by him after consultation with the respective States and interstate agencies. The Administrator will make this determination under this paragraph only if EPA's appropriation process indicates that these funds should be used for this purpose."

This change was not deemed to be a "significant regulatory action," it was not subject to the notice and comment requirements of the Administrative Procedures Act, or any other statute, nor was it reviewed by the Office of Management and Budget.

## **Drought/Water Supply**

### *Water Supply Outlook/Snowpack*

The Natural Resources Conservation Service (NRCS) is marking the 100th anniversary of the beginning of snow survey activities. The first historic step was remembered by Dr. James E. Church, a classics professor at the University of Nevada in Reno, at the Snow Surveyors' Forum, Western Snow Conference, in 1952. "In 1906, I offered to climb Mount Rose every month for a year to obtain temperatures on mountaintops. The United States Weather Bureau furnished the thermometers, the Adams Fund was available for research in agriculture, and the Nevada Agricultural Experiment Station was willing. The Study of snow was begun. At the time the engineers and Gifford Pinchot were locked in bitter argument regarding the value of forecasts for the

conservation of snow. Mount Rose provided the opportunity for experiments. The Mt. Rose snow sampler was developed and snow courses were laid out. The water content of the snow was measured." The techniques developed by Dr. Church were the beginnings of the current NRCS Snow Survey and Water Supply Forecasting Program. On July 1, 1935 the Federal government entered the picture, as directed by the Congress, to coordinate and expand the system of snow surveys that existed for water supply forecasting to all of the western states.

According to a weekly NRCS report on January 19th, near record low snowpacks continue in the Southwest, in Arizona, New Mexico, southern Utah and Colorado. This is a stark contrast to extremely high snowpacks reported last January. Sixteen SNOTEL sites in Arizona and New Mexico were snow-free. Snowpacks increased in the Sierras of California, many Cascades stations in Oregon and Washington, Idaho and southwestern Montana. Snowpacks also increased in the Great Basin of Utah and Nevada. In the Pacific Northwest, snowpacks are now near normal in most basins. Snowpacks are above average in northern Utah, southern Idaho, the central Sierras of California, southwestern Montana and western Wyoming. Snowpacks are above average in northern Colorado and southern Wyoming.

Temperatures for the preceding week were very warm throughout most of the West, ranging from 3-19 degrees above average. Precipitation totals ranged from 2 to 5 inches across parts of California and the Oregon and Washington coasts, and 0.5 to 1.5 inches in Idaho. The Colorado Rockies and Southwest were essentially dry. Precipitation totals continue well below average in the Southwest, above average in the Pacific Northwest and near, to slightly above, average in the Rockies of Colorado, Wyoming, and western Montana. Seasonal precipitation is well above average in the central Sierras of California, Nevada and southern Idaho.

According to the National Drought Mitigation Center, dry conditions intensified and spread eastward from Arizona to southwestern New Mexico with low streamflows (less than 50%), little snowpack and warm weather. The National Weather Service (NWS) reported no precipitation at the Phoenix airport through October 19th, the seventh driest such stretch on record since 1895. Northern New Mexico and southern Colorado continue to be dry, with many snowpacks below 50% of normal, and record low snow water equivalents. Portion of western Montana, central Wyoming, southeastern Arizona, and eastern Nebraska are in moderate drought. Much of eastern Oklahoma and Texas continue to battle severe to extreme drought and wildfires.

As of March 1, record low snowpacks continued in the Southwest while snowpacks were above, to well above average in Oregon, southern Washington, southern Idaho, western Wyoming, northern Utah and northwestern Colorado. Seasonal precipitation was extremely low in the Southwest and well above average in most Pacific Northwest basins in response to a series of warm, sub-tropical storms that had moved through the region. Extremely low seasonal streamflow is forecast for most basins in Arizona, New Mexico and southwest Utah as a result of record low snowpacks and lack of precipitation. Streamflow forecasts are above average in northern Colorado, northern Utah, southern Wyoming, northern Nevada, southern Idaho, the Sierras of California, most of Oregon, the southern Cascades of Washington, and parts of western Montana. Near, to slightly below average streamflow is forecast for northern Washington, northern Idaho, British Columbia, western Montana, northern Wyoming and southern Utah and southwestern Colorado. As of March 1, reservoir storage levels for all western states were slightly below seasonal averages with the exception of Arizona, California, and Oregon which are slightly above historical averages. For information, visit: <http://www.wcc.nrcs.usda.gov>.

By mid-July, Colorado Governor Bill Owens had declared 59 of 64 counties federal agricultural disaster areas, and two more had applied for such designation. At that time, state spokesman Dan Hopkins, observed that "...the drought is not over. It's an ongoing problem, an ongoing situation that's ultimately going to have to be addressed by such things as increased conservation and increased storage capacity." Irrigated acreage in Colorado has dropped to its lowest level in 32 years, with about one million acres fallowed since the highest point in the 1970s. Irrigated acreage is less than 2.4 million acres, compared to estimates of 3.1 million acres six years ago. Drought is partly to blame, but irrigated acreage is also disappearing with urbanization, cities acquiring agricultural water rights, and limits on ground water development intended to protect senior surface water users. "We're going to have to look at this much more closely," said Rick Brown with the Colorado Water Conservation Board. Dan Luecke, a respected water and environmental consultant believes such transfers are "...inevitable. However, anyone who says we'll get all of our water from agriculture is either being very insensitive or not very savvy." (Rocky Mountain News, 7-18-06 and 7-29-06)

August thunderstorms brought moderate to heavy rains (1 to 4 inches) to a large area from the Texas panhandle northeastward across Oklahoma, and eastern Kansas, helping alleviate drought conditions, which range from moderate to extreme. Elsewhere in the southern Plains, extreme drought conditions in the lower Rio Grande Valley have pushed northeastward into central Texas with more hot and dry weather. There has been very little rain recently, while temperatures have averaged 4-8° above normal. Dallas/Fort Worth recorded 19 straight days of triple digit temperatures, affecting people, but also wildlife as water holes dried up.

In the High Plains, moderate to heavy rainfall moderated drought conditions in North Dakota, but South Dakota is still suffering extreme to exceptional drought. Extreme drought conditions are also affecting agriculture in western Nebraska. The recent wet pattern continued in the Southwest, as summer monsoon rains brought drought relief to New Mexico and southeastern Arizona, where conditions remain abnormally dry to moderate drought. Drought conditions in central and southern Arizona are still severe to extreme. In the central Rockies, rains have eased dry conditions somewhat, but moderate to severe drought categories are dominant across Colorado and Montana, with extreme drought afflicting central Wyoming and some parts of southeastern Montana. Little or no rain in the northern Rockies, which has meant no change in the drought classifications. In Utah, only the southeast corner is experiencing some moderate drought. An abnormally dry area in the Northwest, mainly central Washington and eastern Idaho, has raised some concerns related to agriculture, and fire danger. Although August precipitation is normally low, there has been little or no recent rain. Oregon, California and Nevada are largely free of drought. Short-term forecasts call for above normal rains over the southern Rockies into west Texas, with continued warm and dry weather in the Northwest. (Drought Monitor, 8-31-06)

With the beginning of the new water year in October, Denver Water reservoirs were at 90% of capacity, compared to 51% in October 2002. Greg Fisher, Chief Planner, attributes recent improvements to last year's healthy snowpack, reductions in outdoor water use by the utilities' 1.2 million customers, and providential fall and summer rains. "Our customers continue to do a great job in keeping their water use down and using only what they need." Still, 2006 may still go down in the record books as the driest in Denver's history, beating out 2002 when just 7.48 inches of precipitation were recorded at Denver International Airport. Denver Water Resource Engineer Bob Steger says, "We're well-positioned for next year, although we still need to have a decent snowpack. We need to continue using water wisely, but the drought is essentially over." (RM News, 10-16-06)

Reportedly, people are not just watching their own water use - but their neighbors too! Private investigators have been hired by some communities and farmers with senior water rights to check into illegal ground water pumping. A data base of acreage possibly irrigated illegally has been compiled and presented to Colorado State Engineer Hal Simpson, who is investigating the claims. In May, the state cut off some 440 wells affecting South Platte River flows when an agreement on emergency water replacement plans could not be reached. Crop losses were significant, and some farmers may not be in compliance with the order.

According to Tim Buchanan, an attorney representing farmers with senior rights, "We started hearing rumors and people in the area where the wells are located called us and said people were pumping contrary to the state's order." So together with some communities, they hired an investigator to survey 50 plots. "We looked only at properties that had wells as their sole source of water. Not only were they wet, they were growing crops." Boulder and Highlands Ranch were two concerned cities. Attorney Veronica Sperling said her clients were concerned about illegal pumping. Carol Ellinghouse, Boulder Resources Coordinator, said, "They went out and some farms showed signs of being recently irrigated. Others were pretty lush, a condition that couldn't happen if they weren't watering." John Hendrick, General Manager, Centennial Water and Sanitation District, agreed to the surveillance. "It's like people running a stop sign or speeding. The thing to do is identify the problem and fix it." Farmer Steve Bruntz observed, "There was one man taking pictures. My wife asked if she could help him and he sped off." Farmer John Moser is still irrigating with water from a small lake on his property, and his 290 acres were included in the investigation and observed as "green and vigorous alfalfa." He said, "It does upset me, for in fact they don't know the details.... It's gotten out of hand. People are yelling and screaming at each other." Farmer David Knievel said, "I wish I could have caught them on my property. We shoot every other trespasser and he'd be the second one." (SFGate.com 10-19-06)

An early-season snow storm on October 25th-27th, blanketed the Colorado Rockies with as much as two feet of snow. Snow was heavy across north-central Colorado, where storm water equivalents topped two inches, with subsequent modest improvements in moderate to severe drought conditions. Similarly, southeastern Idaho water supplies benefitted from light snow and a reassessment of earlier precipitation totals led to a slight reduction in observed abnormal dryness. A narrow band of heavy rain spread across southeastern Colorado and much of Kansas boosting topsoil moisture reserves for pastures and winter wheat. The 1-3 inches of rain ameliorated some moderate to severe drought conditions. In contrast, mostly dry weather persisted across much of Oklahoma's winter wheat belt (23% is in very poor to poor condition), where moderate to extreme drought remains entrenched.

The northern and central Plains' long-term, hydrologic drought lingers and agricultural concerns include limited irrigation reserves and poor pasture. Light snow blanketed much of Montana on October 30, helping to insulate emerged winter wheat from an early-season cold snap. The snow and a reassessment of earlier precipitation patterns, led to a improvements in areas designated as suffering from severe drought, especially in northeastern Montana. In northeastern Colorado, along the South Fork of the Republican River, Bonny Reservoir held 10,240 acre-feet of water on September 30, which is only 30% of average. The percentage of pasture and rangeland rated very poor to poor by USDA includes: Colorado (31%); Montana (35%); South Dakota (44%); Nebraska (45%); Kansas (46%), North Dakota (50%); and Wyoming (63%).

The 2006-2007 water year is off to a slow start from the West Coast states eastward into the western Great Basin. California's Central Valley, rainfall totals for July-October 2006 totaled just 0.08 inch in Fresno and 0.26 inch in Redding (about 9% of normal). However, July to October is

typically dry. One effect is the very poor to poor condition of pasture and rangeland in California (84%), Oregon (55%) and Nevada (40%). Also, in Riverside County, California battled the 40,000 acre Esperanza fire, which has claimed the lives of five firefighters and more than 30 homes. The fire, a result of arson, expanded rapidly in part due to dry conditions, but stoked by Santa Ana winds and a heavy fuel load. (Drought Monitor, 10-02-06)

### Warming Trend

On January 24, the National Aeronautics and Space Administration (NASA) reported 2005 will go down as the warmest of record, followed closely by 1998 (influenced by a strong El Nino), then 2002, 2003 and 2004. It is the lack of any extraordinary climatological event, such as El Nino, which really makes 2005 stand out. According to NASA's Goddard Institute for Space Studies (GISS) in New York City, "The results would indicate that a strong underlying warming trend is continuing." GISS Director James Hansen observes, "The five warmest years over the last century occurred in the last eight years."

Using temperature data from land-based weather stations, satellite measurements of sea surface temperature (since 1982), and early historic ship logs, NASA scientists found the Earth has warmed by .06° C or 1.08° F over the last 30 years, compared to 0.8° C or 1.44° F over the past 100 years (with a 95% statistical confidence level). "It's fair to say that it probably is the warmest since we have modern meteorological records," says Drew Shindell. "Using indirect measurements that go back farther, I think it's even fair to say that it's the warmest in the last several thousand years." Possible sources of error include "...incomplete station coverage, quantified by sampling a model-generated data set with realistic variability at actual station locations, and partly subjective estimates of data quality problems."

According to GISS, the current warming seems to be occurring nearly everywhere at the same time, but is greatest at high latitudes in the Northern Hemisphere. Over the last 50 years, the largest annual and seasonal warmings have occurred in Alaska, Siberia and the Antarctic Peninsula. Most ocean areas have warmed. Because these areas are remote and far away from major cities, it is clear to climatologists that the warming is not due to the influence of pollution from urban areas. The recent warming coincides with the rapid rise in human-made greenhouse gases, and is consistent with expectations from climate models. See <http://data.giss.nasa.gov/gistemp/2005/> and/or [http://www.nasa.gov/vision/earth/environment/2005\\_warmest.html](http://www.nasa.gov/vision/earth/environment/2005_warmest.html) for more information.

Further, Scientists at the Scripps Institution of Oceanography in San Diego, using deep ocean paleontologic records, have found an abrupt ocean circulation reversal caused by greenhouse gas warming that illustrates how quickly warming may "disrupt ocean processes and lead to drastic climatological, biological and other important changes around the world." According to Scripps scientist Flavia Nunes, "Fifty-five million years ago, when the earth was in a period of global warmth, ocean currents rapidly changed direction and this change did not reverse to original conditions for about 20,000 years. What this tells us is that the changes that we make to the earth today (such as anthropogenically induced global warming) could lead to dramatic changes to our planet." She believes that the global warming of the Paleocene/Eocene period emerged over less than 5,000 years, "an instantaneous blip on geological time scales," but the warming could have come much more quickly than geological records can show. For further details see [http://scrippsnews.ucsd.edu/article\\_detail.cfm?article\\_num=708](http://scrippsnews.ucsd.edu/article_detail.cfm?article_num=708).

### National Integrated Drought Information System

On April 6, Rep. Ralph Hall (R-TX) introduced H.R. 5136, a bill to create a National Integrated Drought Information System (NIDIS), within the National Oceanic and Atmospheric Administration (NOAA). The Western Governors' Association and Western States Water Council have strongly supported such legislation. Rep. Hall stated, "Our nation is unfortunately very aware of the damage droughts bring to our citizens. In my home state of Texas, the wheat crops have been decimated by drought conditions, producing the worst ratings in 20 years. My own home district in northeast Texas is experiencing the most severe damage statewide from the drought. In Missouri, farm ponds have been drying up in record numbers, and in Oklahoma, 58% of the wheat crop rated poor to very poor. Droughts cause between \$6 billion and \$8 billion a year in direct estimated losses to the U.S. economy, and they have devastating impacts on our society."

He observed, "While we cannot stop nature, we can do a better job predicting, monitoring, and mitigating this problem. Our nation needs a comprehensive drought information system that enables our local, state, and national leaders to be more proactive in their approach to droughts. This bill establishes an integrated system and designates NOAA as the lead agency. NOAA will coordinate with local, state, and federal entities to create a comprehensive network of drought information and provide decision-makers with the best tools to manage our resources. NOAA will do this by building a national drought monitoring and forecasting system, create a drought early warning system, provide an interactive drought information delivery system, and designate mechanisms for improved interaction with the public." He concluded, "This NIDIS initiative will hopefully improve our analysis of conditions, provide us with more accurate seasonal forecasts, and equip us with a better understanding of climate interactions that produce droughts. I would like to encourage Members to join me in supporting this vital and important initiative."

After a May 4 hearing, the House Science Committee's Subcommittee on Environment, Technology and Standards, Chaired by Rep. Vernon Ehlers (R-MI), marked up and approved by voice vote H.R. 5136, introduced by Rep. Ralph Hall (R-TX) and Rep. Mark Udall (D-CO). The bill will help decisionmakers by coordinating and expanding drought monitoring and data collection systems to comprehensively cover key indicators such as snowpack, streamflow, soil moisture, reservoir and ground water levels, etc. It provides an integrated data collection and dissemination system, and tools to support analysis and decisionmaking at all levels and geographic scales.

Chairman Ehlers declared, "Drought is a pernicious disaster; it can creep up on you in the form of pleasantly cloudless days, but once it has arrived it can destroy livelihoods, damage valuable ecosystems, and even threaten human health. Since we cannot manufacture more water, our best defense against this creeping threat is knowledge and well informed management of the water resources that we have. We must provide clear and accurate warnings of coming droughts so that we can seek appropriate solutions and take preventive actions, such as increased water conservation.... The National Integrated Drought Information System Act seeks to provide just that kind of information."

"Droughts have a devastating effect on our local, state, and national economies," Rep. Hall stated. "Like so many areas of the country, my home district has been tormented with drought - so much so that the U.S. Department of Agriculture has declared every county in my district a primary disaster area. H.R. 5136, will coordinate drought efforts between local, state, and federal entities and provide decision makers with the best tools to manage our natural resources. It addresses a fundamental problem our nation faces related to drought monitoring - it helps coordinate what are now ad hoc efforts and better disseminate useful information to the people who need it the most."

Testifying for H.R. 5136 were: Duane Smith, Western States Water Council, Vice Chairman, also representing the Western Governors' Association; Kenneth Dierschke, President of the Texas Farm Bureau; Marc Waage, P.E., Manager of Raw Water Supply for Denver Water; Dr. Donald Wilhite, Director of the National Drought Mitigation Center; and Dr. Chester Koblinsky, Director of the Climate Program Office at the National Oceanic and Atmospheric Administration (NOAA). Dr. Koblinsky testified that the Administration is working on the initial design and implementation of a drought monitoring/forecast system. He said, "Drought is estimated to result in average annual losses to all sectors of the economy of between \$6 to 8 billion.... Severe fire seasons due to drought and frequent winds can also result in billions in damages and fire suppression costs."

Duane Smith testified, "The Western Governors' Association and Western States Water Council support the National Integrated Drought Information System Act of 2006, and urge its enactment.... The Western states believe that enactment of NIDIS will help move the country toward a proactive approach that will avoid conflicts and minimize the damage caused by future droughts, thereby saving taxpayers money. The greatest current data shortfalls are on the local and state levels. Physical information and drought impact information at these levels is almost impossible to obtain in a uniform manner across the nation.... NIDIS will provide water users across the board - farmers, ranchers, utilities, tribes, land managers, business owners, recreationalists, wildlife managers, and decision makers at all levels of government - with the ability to assess their drought risk in real time and before the onset of drought, in order to make informed decisions that may mitigate a drought's impacts."

"Drought is literally squeezing the life out of Texas agriculture," said Dierschke. He added that drought caused more than \$1 billion in damage to Texas' agricultural economy in 2005 alone. "In our view, H.R. 5136 is an investment in new technology and systems that will benefit the nation far beyond an individual farm or ranch. But speaking for those farmers and ranchers, Congressman Hall's bill will certainly help us prepare for an all too uncertain future."

"NIDIS would also establish an Internet portal - to be run by NOAA - that would serve as a clearing house for data from federal and non-federal entities to provide real-time information on current conditions, as well as drought forecasts." Mr. Waage said such one-stop shopping would have been invaluable in 2002 when Denver Water was responding to one of Colorado's most severe droughts in history. "During the drought, my staff and I spent countless hours combing the web to identify all the drought information that is spread across many federal agencies. It is quite difficult for casual users to access and understand this information. The Internet portal would promote much greater understanding by all those affected by drought."

Last, Dr. Wilhite testified, "The National Drought Mitigation Center at the University of Nebraska-Lincoln strongly supports greater investment in research and policies directed at reducing this nation's vulnerability to drought through a more risk-based approach. NIDIS is a critical step in this direction.... I have been involved in drought-related research and outreach since 1980. My efforts have principally been focused on how to lessen the nation's vulnerability to drought through improved monitoring and early warning, mitigation, and preparedness. We have made considerable progress, but much work remains. NIDIS has the potential to help improve the nation's capacity to cope more effectively with severe drought episodes that create significant impacts on the nation's economic, environmental, and social fabric."

On June 7, the House Science Committee marked up and approved H.R. 5136. The National Oceanic and Atmospheric Administration (NOAA) serves as the lead federal agency, with assistance from the National Science Foundation, Army Corps of Engineers, Bureau of Reclamation, U.S.



Geological Survey, Environmental Protection Agency (EPA) and the U.S. Department of Agriculture. NOAA is already moving forward with plans for the program, and estimates it will take five to six years to fully implement. First proposed in a 2004 report by the Western Governors' Association, NIDIS would focus on developing an internet portal for water users and managers and an early warning system to help anticipate and mitigate the economic and environmental effects of drought and water shortages. H.R. 5136 would fund NIDIS through 2012 at a total cost of \$104 million.

On the Senate side, Senator Ben Nelson (R-NE) introduced S. 2751 on May 4. He said, "The issue of drought is one I have been involved with for many years. One of my biggest frustrations the past few years as an elected official, trying to help the areas of my State devastated by drought, has been making people understand that this drought really was a disaster – as much as a hurricane, or an earthquake, or a tornado. Fortunately, drought conditions are improving in Nebraska, but we have endured a number of very difficult years struggling with the impact drought has had on our economy and environment and the social implications that go along with a disaster like this."

He observed, "Over the last decade, several severe and long-term droughts have occurred in the United States. Recent severe drought conditions across the Nation and in particular in the West have created life-threatening situations, as well as financial burdens for both government and individuals. Extremely dry conditions have led to numerous forest and rangeland fires, burning hundreds of thousands of acres of land, destroying homes and communities, and eliminating critical habitats for wildlife and grazing lands for livestock.... The droughts have caused shortages of grain and other agricultural products resulting in soaring prices that will be passed on to consumers.... The droughts have negatively affected livestock market prices and caused the premature selloffs of herds. The droughts have threatened municipal water supplies, causing many communities to develop new water management plans which institute water restrictions and other water conservation measures. Drought causes...negative effects on commerce and industry, tourism, air, water and other natural resources, and quality of life for our citizens, ranging from limits on recreational opportunities to loss of employment.... According to NOAA, the federal government spends on average \$6-8 billion per year on drought. The most devastating of these was the 1988 drought in the central and eastern U.S. which caused severe losses to agriculture and related industries totaling \$40 billion and an estimated 5,000-10,000 deaths."

Senator Pete Domenici (R-NM) cosponsored the bill saying, "Drought is a unique emergency situation; it creeps in unlike other abrupt weather disasters. Without a national drought policy we constantly live not knowing what the next year will bring. Unfortunately, when we find ourselves facing a drought, towns often scramble to drill new water wells, fires often sweep across bone dry forests and farmers and ranchers are forced to watch their way of life blow away with the dust. This year, my home State of New Mexico is facing a very real threat of devastating drought, as our snow pack was far below average. We must be vigilant and prepare ourselves for quick action as this next drought cycle begins. Better planning on our part could limit some of the damage felt by drought. I submit that this bill is the exact tool needed for facilitating better planning."

On December 6, the Senate passed H.R. 5136, approved by the House on September 26, without amendment by unanimous consent, clearing the bill for the President. The bill had the strong support of the Western Governors' Association and Western States Water Council. Entitled the National Integrated Drought Information Systems Act of 2006, it provides for an effective drought early warning system, developed under the leadership of the Department of Commerce's National Oceanic and Atmospheric Association. It will provide reliable and timely drought forecasts and assessments, communicating drought conditions and expected impacts to federal, state and local

decisionmakers as well as the public in an attempt to avoid or mitigate damages. It will build on existing partnerships and forecasting and assessment capabilities. Further, it provides for coordinated drought research, to the extent practical. The bill authorizes a total of \$81 million for FY2007-FY2012.

### Emergency Drought Assistance

On June 15, the Senate approved a conference report on the FY2006 Emergency Supplemental Appropriations Bill (H.R. 4939) by a 98-1 vote. The House approved the report two days earlier by a 351-67 vote. While funding Iraq war spending and hurricane relief, the bill also includes drought emergency assistance. Title IV includes a \$5 million appropriation to remain available until expended by the U.S. Army Corps of Engineers and \$7.5 million for the Bureau of Reclamation. Further, it extends authority under Title I of the Reclamation States Emergency Drought Relief Act of 1991 through 2010 (Section 9011).

The Senate passed S. 648, an extension to the Reclamation States Emergency Drought Relief Act of 1991, introduced by Senator Gordon Smith (R-OR), in December 2005. The bill was referred to the House Resources Committee's Water and Power Subcommittee, which had jurisdiction over companion legislation, H.R. 2925, introduced by Rep. Ruben Hinojosa (R-TX). Hinojosa introduced the bill after consultation with the Western States Water Council. Unfortunately, the House failed to pass legislation.

The 1991 Drought Act (P.L. 102-250), as amended, authorized the U.S. Bureau of Reclamation to undertake drought relief measures through emergency assistance (Title I) and planning activities (Title II). Title I provided temporary authority that expired on September 30, 2005. S. 648 and H.R. 2925 extend Title I authority until September 30, 2010.

Title I of the Drought Act provides authority for construction, management, and conservation measures to address drought impacts, including the mitigation of fish and wildlife impacts. With the exception of permanent wells, only temporary construction activities are authorized. Title I also authorizes Reclamation to enter into temporary contracts to make project and non-project water available and allows Reclamation facilities to be used for storage and conveyance purposes for use outside an authorized project service area. It also authorizes the Secretary to make water available for protecting fish and wildlife resources outside a project's authorized service area on a nonreimbursable basis. The Drought Act provides for both reimbursable and non-reimbursable activities although all activities to date have been non-reimbursable. Pursuant to the Act, the Bureau is authorized to make loans to water users for mitigating damages caused by drought. The seventeen Reclamation States and Hawaii, as well as tribes within those states, are eligible for this assistance.

Title I also authorizes the Secretary to make loans to water users for undertaking conservation, construction, or management activities or the acquisition and transportation of water to mitigate drought losses - and sets forth repayment obligations. It authorizes the Secretary to: (1) provide non-financial assistance to buyers for purchasing available water supplies from willing sellers; (2) purchase water from willing sellers; and (3) participate in water banks set up by States. It outlines provisions governing repayment obligations for water provided on a temporary basis. It requires the Secretary to charge recipients for the use of non-project water for municipal, industrial, and agricultural uses. It also requires the payment of capital costs attributable to the sale of water or the use of Federal Reclamation project facilities to be deposited into the Reclamation Fund and credited to the project from which the water or facility is supplied.

On July 31, the seventeen western governors wrote Senate Majority Leader Bill Frist (R-TN) and Minority Leader Harry Reid (D-NV) asking for drought relief legislation: "We, as Governors representing Western states, are writing on behalf of farmers and ranchers suffering drought and other natural disasters. For some time now, farmers and ranchers throughout the Western United States and other parts of the country have been either suffering or recovering from drought and other severe weather conditions. The current record setting heat wave in many of our states will impose considerable burdens on agriculture. Current forecasts in some areas are predicting more dry weather, with little promise of relief."

The letter continues: "These weather conditions, in combination with increased production costs, are taking a terrible toll on our farmers and ranchers, and their livestock and crops. In order to continue to provide America with quality, affordable food under these conditions, disaster assistance legislation is imperative. It is vitally important that Congress passes legislation this year providing meaningful disaster relief to help farmers and ranchers through these disaster conditions. We... strongly encourage you to support disaster assistance for farmers and ranchers who have suffered severe losses due to these natural disasters."

Before adjourning for the Thanksgiving holiday, on November 16, the House and Senate approved a second Continuing Resolution to fund the government through December 8. The House had passed its appropriations legislation, but the Senate had acted on only three bills, Defense, Homeland Security and Military and Veterans Affairs. North Dakota Senators Kent Conrad (D) and Byron Dorgan (D) planned to offer a disaster spending amendment to a \$18.2 billion Agriculture spending bill. Of note, it included \$4.5 billion to pay for drought and other damages due to disasters over the last six years, with \$4 billion in back payments through 2005. Twice the Senate has approved farm disaster spending in prior appropriations bills only to see it removed in conference by the House after the Administration threatened a veto.

On the floor, Senator Dorgan exclaimed, "This country goes almost every place in the world to help when there is trouble. What about at home? What about when there is trouble on the family farm? I know that is far from the city lights and far from the cameras, but the fact is, there is real trouble for families whose dream is about to end because... a drought came around and destroyed everything on their farm or it is because a flood came and washed it away.... Now what happens with disasters, with no disaster title in the farm bill, we face a situation where, because of two years - 2005, with substantial flooding, and in 2006 a protracted drought in some significant areas of the country - we face a prospect of losing a great many family farms...."

House Minority Whip Steny Hoyer says Democrats would like to see spending bills, totaling about \$460 billion, passed this year, rather than wait for the next Congress. "We are prepared to work with the Republicans to try to get them passed," Hoyer said. "We're going to pass as many as we can and see where we go from there," says Senate Majority Whip Mitch McConnell (R-KY). Senate Appropriations Committee staff declare, "Although the calendar is clearly against us, it remains Chairman [Thad] Cochran's hope that we try and pass as many bills on the Senate floor as possible. The only irresponsible action we can take at this point is to not finish our work this year."

On December 5, on the Senate floor, Senator Kent Conrad (D-ND) unsuccessfully sought an amendment to the Agriculture appropriations bill adding \$4.8 billion in emergency funding for drought, flood and fire relief to farmers and ranchers. A three-fifths majority was required to waive the FY2007 Budget Resolution, and the amendment failed 57-38. Conrad, citing the strong support (and absence of three Senators that favor the bill), promised to prevail in the new Congress.

## Endangered Species Act

### Middle Rio Grande Silvery Minnow

On January 13, Senator Pete Domenici (R-NM) praised the New Mexico Interstate Stream Commission (ISC) for the commencement of work on the Middle Rio Grande Habitat Restoration Project, which meets some of the requirements of a 2003 Biological Opinion. ISC will treat 24 acres of the Rio Grande under Phase I. As chairman of the Senate Energy and Water Development Appropriations Subcommittee, Domenici secured over \$28 million for the Bureau of Reclamation's Middle Rio Grande Project this year, including \$12.9 million for cooperative projects associated with the endangered silvery minnow and \$2 million to construct an off-channel minnow sanctuary in the Albuquerque bosque.

"For years, I have urged the agencies involved in the middle Rio Grande to bring the minnow to the water, rather than trying to keep the entire Rio Grande flowing in the hottest parts of the summer. I'm pleased that the Interstate Stream Commission is acting on that suggestion and embarking on this project, which will restore the habitat in an area with consistent water flow," said Domenici. (Domenici Press Release, 1-14-06)

Domenici has also introduced the Middle Rio Grande Endangered Species Collaborative Program Act (S.1540) to formally authorize collaborative efforts to protect the silvery minnow and the southwestern willow flycatcher and related riparian habitat. Established in 2000 and signed in 2002, the program involves federal, state and local governments, as well as pueblo and community interests, in finding solutions through collaborative agreements, rather than litigation. The ISC's recent work is an example of that collaboration, with funding of \$728,000 from the New Mexico Water Trust Board, \$336,000 from the Interstate Stream Commission, and \$272,000 from the Collaborative Program itself.

In July, the City of Santa Fe agreed to sell to the Bureau of Reclamation 2,500 acre-feet (af) of water in Abiquiu Reservoir. According to Reclamation's Mary Perea Carlson, the agency will use the water to meet downstream needs along the Middle Rio Grande for the endangered silvery minnow under a 2003 U.S. Fish and Wildlife Service biological opinion. Santa Fe and others have contract rights to San Juan-Chama Project water diverted through a system of tunnels from San Juan River tributaries in the Colorado River Basin, under the Continental Divide, and passing through Heron and El Vado Reservoirs to reach Abiquiu. Santa Fe has 15,000 af stored in Abiquiu, including 8,000 af under an expiring agreement with Albuquerque.

Santa Fe is unable to fully use its current storage allotment directly, until its Buckman Direct Diversion Project (under construction) is completed in 2009. Unless other contractual requirements are waived, the City must either use or lose its stored water, so the sale is a win-win solution, says Claudia Borchert, who is with Santa Fe's Sangre De Cristo Water Division. Reclamation will pay the city \$100/af, which is the going rate for stored water in Abiquiu (compared to \$47/af for this year's water in Heron).

Reclamation is negotiating the purchase of 48,000 af of San Juan-Chama water from the Albuquerque-Bernalillo County Water Authority. Meanwhile, it is also purchasing "one-time-use" water from the Jicarilla Apache (6,000 af); San Juan Pueblo (2,000 af); Los Alamos County (1,200 af); City of Belen (450 af); and Red River (66 af).

To protect the silvery minnow, Reclamation is required to maintain some flows in the Rio Grande between Cochiti and Elephant Butte Reservoirs through June 16, after which up to a four-

mile stretch can go dry under a "managed recession." Environmental groups have also leased 30,000 af of space in Abiquiu, to be used to protect minnow habitat, under an agreement with Albuquerque. Interagency teams also work to rescue minnows when the river dries up, as they did last month before steady rains improved flows. However, with flow levels dropping again, rescue work will likely resume soon. Minnows are moved either to a wetter river reach or to a refugium in the Albuquerque Biological Park. More than 20 pueblos and municipal, state and federal agencies are working together to protect and restore riparian Bosque habitat along the Rio Grande. (The New Mexican, July 14)

### Missouri River Basin

On January 23, the U.S. Army Corps of Engineers announced it would spend \$54 million to protect endangered species along the Missouri River. The target species are the pallid sturgeon, interior least tern and piping plover. The work above Sioux City, Iowa will focus on building sandbar habitat for least terns and piping plovers and monitoring adult populations and nesting success. Work below Sioux City will focus on acquiring and building shallow water habitat for pallid sturgeon, hatchery improvements and monitoring populations and reproduction success. While aimed at these protected species, other native fish and birds will benefit from the newly developed nesting and spawning habitat.

"This is a tremendous opportunity for the Missouri River basin," said Brig. Gen. Gregg Martin, Northwestern Division Engineer. "This level of funding allows us to not just comply with the Endangered Species Act, but gives us a good start on the path to recovery for these species. We will build habitat, modernize hatcheries, and monitor the responses of the birds and fish and then refocus our efforts on what works best. At the same time, we will continue to fulfill our Tribal trust and treaty responsibilities and meet all of our project purposes of flood control, navigation, hydropower, irrigation, recreation, water supply, water quality and fish and wildlife."

### Columbia River Salmon

On January 25, Jim Connaughton, Chairman of the White House Council on Environmental Quality (CEQ), told those attending a conference on the Future of Wild Pacific Salmon at Oregon State University, "Salmon recovery is our shared goal and it is our responsibility to promote recovery and collectively take action to improve the salmon lifecycle.... For some time now, the states of Oregon, Washington, Idaho, and Montana, the federal government, tribal groups and many other interested parties have labored to protect salmon stock while producing clean/low-cost hydro electricity. Northwest ratepayers and federal taxpayers have invested billions of dollars toward restoring habitat and improving hydropower structures and operations... In the mid-1980s, the Northwest Power Planning and Conservation Council established a goal of doubling the salmon runs. The dramatic increases in returning adults in recent years are a result, at least in part, of the community and multi-party actions taken in response to that call to action."

He continued, "Our focus...is appropriately shifting, as it must, toward the greater aspiration of the Endangered Species Act, which encourages us to achieve recovery of wild salmon in the Columbia River. That is why today I am announcing two important, new objectives for advancing the recovery effort: ending outdated hatchery programs and stopping harvest levels and practices that impede recovery of wild, endangered and threatened salmon. The reason is simple. We cannot improperly hatch, and we cannot carelessly catch, the wild salmon back to recovery. To achieve these objectives, we will employ a comprehensive and collaborative process that will add to our investments in habitat restoration and hydropower operations, including our recently enhanced collaboration for the Federal Columbia River Power System. Our history of initial progress

demonstrates that, with clear goals and focused efforts across all elements of the salmon's life-cycle, we can create a legacy of wild salmon recovery for future generations. Our shared goal requires our shared responsibility.”

National Oceanic and Atmospheric Administration (NOAA) Fisheries will launch a collaborative review of how harvest and hatcheries - particularly federally funded hatcheries - are affecting the recovery of ESA-listed salmon and steelhead. NOAA says this review will be open, thorough and independent, using a highly-respected non-federal facilitator. It will identify not only where hatchery programs are impeding the recovery of wild salmon, but also where there are opportunities to intelligently employ hatcheries to increase harvest without impeding recovery. The model for this collaborative review will be the Hatchery Scientific Review Panel, which advanced major reforms in Puget Sound. This effort, and its extension to the Columbia Basin, has strong bipartisan support in Congress.

The President requested and Congress appropriated, \$9 million last year for ESA recovery planning. Also in FY2006, for the first time, Congress fully funded the President's request for approximately \$15 million for implementation of the biological opinion for the Federal Columbia River Power System. NOAA also got \$500,000 for hatchery reform.

“We remain committed to improving all aspects of the salmon lifecycle,” says Bob Lohn, NOAA Fisheries' Northwest Regional Administrator. “In addition to the impressive, ongoing work to restore salmon habitat and survival through the hydro system, this collaborative review, and the decisions it produces, will help us to better utilize hatchery and harvest management techniques for recovery.” Decisions and commitments on harvest and hatcheries will continue to be made through an intricate network of federal, state, tribal, and Canadian decisionmakers.

The renewed scrutiny of wild salmon harvest includes maintaining and expanding data collection activities fundamental to managing harvest levels, fish passage, and other vital dynamic aspects of salmon conservation, reviewing and improving fishing technology and practices so they are more selective, tightening standards of protection for threatened or endangered wild salmon and re-evaluating the international dynamics of harvest to establish a strong U.S. conservation position for the 2008 Pacific Salmon Treaty talks with Canada.

#### Keystone Group Report

In a February 17 letter to Senator Lincoln Chafee (R-RI), Chair of the Environment and Public Works Committee's Fisheries, Wildlife and Water Subcommittee (and other key Senators), the Keystone Center previewed a report by a diverse working group charged with finding consensus recommendations on issues related to the Endangered Species Act's (ESA) habitat provisions. Committee Chair James Inhofe (R-OK) had agreed to delay action on any ESA reform bill, pending the completion of this work.

A portion of the 17-page letter reads: “We are pleased to present an overview of the group's discussions and some of its conclusions and recommendations. The Keystone Center's full report will follow in several weeks. [T]he ideas contained in this letter are largely conceptual. They offer several promising intellectual and political trails rather than a set of word-smithed agreements directly translatable into legislation. As explained more fully below, the group focused its time and energy toward exploring whether a consensus concept could be developed that it could recommend to replace the current critical habitat framework. Due to a combination of factors and pressures, it was not able to craft one comprehensive consensus-based approach although it did clarify the elements that would need to be addressed to reach agreement.”

“The group agreed in short order that the ESA could do a more effective job of protecting and conserving the habitat that species need to recover, [but] reaching consensus that the status quo should be improved [was] far easier than agreeing on how that ought to be accomplished.... The group presents its recommendations, therefore, with a certain sense of restraint and realism borne of long experience with the ESA. Conflict will continue as competing interests rub and chafe against each other.”

“In essence, the group believes that it should be possible for you and your Congressional colleagues to take steps that would improve the law’s effectiveness for the species at risk, make government activities more efficient, and reduce the concerns of regulated parties. It is the opinion of the group that addressing all three of these issues - the biological needs of the species, the efficiency of government, and the concerns of those most directly affected by the Act’s provisions - is the only practical way to move forward if the goal is to do so in a more consensus - based manner. Quite clearly it would not be difficult to recommend measures to address one set of interests without regard to the other two. The challenge has been to search for those areas of common ground on which these diverse interests can stand given the powerful forces at play on the habitat issues....”

“The group did reach agreement in several areas as described below. Perspectives varied within the group regarding how significant the differences were regarding those issues that remained unsettled. Some felt the agreement might be within reach with more time and work while others believed that some key areas could not be resolved at this juncture.”

The findings and recommendations fall under a set of seven key principles, under the following titles: (1) Applying Three Tests - (a) enhance recovery of listed species, (b) reduce regulatory burdens and costs, and (c) increase participation of non-federal parties in species recovery; (2) Providing Greater Focus on Recovery; (3) Optimizing Regulations and Incentives; (4) Improving Cooperation; (5) Distinguishing Risk Analysis from Risk Management; (6) Ensuring Adaptability; and (7) Providing Agencies with Money.

With respect to the latter, the letter points out, “At several junctures, a number of participants underscored the importance of adequate funding, feeling that even conceptually-sound recommendations would in most cases be of little practical value if not sufficiently underwritten. Some in the group also emphasized that the ESA is in some ways ill equipped by itself to address the bedrock habitat needs of species, likening such attempts to practicing preventative medicine in the intensive care unit. If an objective is to list fewer and delist more species, then it will be important to look beyond the ESA in isolation toward additional conservation measures by state and local governments, private sector efforts, and other regulatory and non-regulatory programs. The ESA in its current form cannot shoulder this burden alone.”

The group emerged from its first meeting with the view that the benefits of “building a better mousetrap” might yield substantially bolder and more important benefits than “tweaks” to the existing ESA regime. Having concluded for a variety of reasons that the ESA’s provisions for protecting the habitat listed species’ need to recover could be improved, the group began to examine an approach that would move away from the current critical habitat framework to one which has three interdependent components: (1) centralize the role of recovery and recovery planning; (2) significantly boost the role of incentives; and (3) revise the Section 7 consultation standard.

Most of the group felt that any concept that had the best prospects for the greatest consensus would likely include a number of elements: (1) new provisions for integrating habitat protection and conservation into the ESA; (2) greater focus on the function, content, scope, and mechanics of recovery plans; (3) clarification or modification of the Section 7 standard; (4) more effective

incentives for non-federal parties; (5) new sources of funding for better coordinated and more workable ESA provisions pertaining to habitat; and (6) a clearer, more effective role for the states.

Specifically, the working group explored whether it would be possible to replace the current critical habitat provision by: (1) increasing the extent and effectiveness of incentives; (2) making the recovery plan the “hub” to guide efforts to improve the status of threatened and endangered species; (3) promoting down-listing or de-listing when possible; (4) appropriately “informing” the full spectrum of ESA Section 6, Section 7, and Section 10 decisions with differing standards of their own; (5) allocating available incentives; and (6) rewording Section 7 to “remove the adverse modification concept and develop a new standard that focuses on species recovery issues and ensuring that any new formulation sets the test for violation of the standard at a level that ensures focused, reasonable and appropriate application.”

The report observes: “Included in this approach would be a need to define the meaning of ‘recovery,’ develop more specific guidance for recovery planning teams, and provide more attention to the means of identifying the habitat necessary for species recovery.” See [www.keystone.org/](http://www.keystone.org/).

Senator James Inhofe (R-OK), Chairman of the Environment and Public Works Committee, was quick to respond. “While it is disappointing that a final agreement could not be reached with regard to critical habitat designations..., it is now clear that the Senate should act to complete the legislative process begun last year in the House and present a strong bipartisan bill that will deliver results for the investments we make every day to protect our lands and wildlife.” Inhofe promised to present a bill for markup, working with Senators Chafee (R-RI), Hillary Rodham Clinton (D-NY), the subcommittee’s ranking member and full committee ranking member Jim Jeffords (I-VT).

House Resources Committee Chairman Richard W. Pombo (R-CA) and Congressman Dennis Cardoza (D-CA), who successfully led ESA reform efforts in the House last year, issued the following statements regarding the Keystone Center’s conclusions: “The Keystone Center’s letter to the Senate reaffirmed the 229 House Members who voted to update and modernize the ESA,” Pombo said. “In fact, it reaffirmed the views of all 415 Members who voted to make significant improvements to the 33-year-old ESA last year, whether those updates were in the House-passed bill or the substitute that was considered as an alternative. One thing is certainly clear: it is not a question of IF, it is a question of HOW, and I look forward to working with the Senate to get this job done.” Cardoza added, “I am very pleased that the Keystone Group has echoed the sentiments of the U.S. House of Representatives on the need to reform the Endangered Species Act. The Keystone Group’s recommendations reinforce what I have long believed: the Endangered Species Act needs to be modernized and refocused on its original goal - species recovery.”

The Western States Water Council continues to work on a protocol for providing the water needed for the conservation of threatened and endangered species within the context of state water law and private property rights. In 1982, the Council was actively involved in the debate leading up to the ESA being amended to add Section 2(c)(2): “It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.” The Council has since worked to try to reconcile conflicts between ESA requirements related to water use and vested state water rights.

### *Klamath River Coho Salmon*

On March 27, the U.S. District Court for the Northern District of California granted an injunction against the National Marine Fisheries Service (NMFS)/NOAA Fisheries and the Bureau of Reclamation (BOR) to prevent harm to coho salmon in the Klamath River. The injunction



requires Reclamation to maintain flows below Iron Gate Dam, as outlined in the 2002 Klamath Irrigation Project Biological Opinion, at the expense of irrigation deliveries if necessary. The Pacific Coast Federation of Fisherman's Associations and the Yurok and Hoopa Valley Tribes requested the injunction. In October 2005, the Ninth Circuit struck Phases I and II of a NMFS 2002 Biological Opinion, "...pending reinitiation of ESA consultation and compliance with a new biological opinion." They were found to be arbitrary and capricious, as they failed to take the life cycle of coho salmon into account, but flow levels articulated in Phase III were upheld.

After the Ninth Circuit's decision, NMFS added a supplement to the 2002 Biological Opinion, attempting to clarify the "no jeopardy" conclusions it had reached. However, the District Court found this to be an illegal post-hoc rationalization, noting that under the ESA a "change of circumstances" requires reinitiation of the consultation process. The court went on to find the invalidation of the Biological Opinion, along with new facts about the Klamath Irrigation Project's impact on coho salmon, to be a changed circumstance. The court concluded that as a result of the Ninth Circuit's decision, NMFS must reinitiate consultation and issue a new biological opinion.

In addition, the District Court issued an injunction to protect the coho salmon. Under Section 7(a)(2), Reclamation must insure that its actions are "not likely to jeopardize the continued existence of any endangered [or threatened] species." Therefore, duty prevents Reclamation from relying on the invalidated biological opinion, except to the extent that it was upheld - namely Phase III flow levels. Moreover, given a "substantial procedural violation," the invalidation of the biological opinion - combined with NMFS's failure to reinitiate consultation and issue a new biological opinion - the court determined it must automatically issue an injunction protecting the listed species and preventing "BOR from making irrigation diversions...unless flows in the Klamath River below Iron Gate Dam meet 100% of Phase III flow levels specifically identified by NMFS in the Biological Opinion as necessary to prevent jeopardy."

### Oregon Coast Coho Salmon

On April 17, fishermen and conservation groups, represented by Earthjustice, announced they will challenge the Administration's decision to remove protection for Oregon Coast coho under the Endangered Species Act. The Pacific Coast Federation of Fishermen's Associations, Pacific Rivers Council, Trout Unlimited, Oregon Natural Resources Council, Native Fish Society, Institute for Fisheries Resources, and Umpqua Watersheds notified NOAA Fisheries (National Marine Fisheries Service) that they consider the removal from the federal list of threatened and endangered species as a violation of federal law and sound science. They say that with strict fishing limits already in place, and changing ocean conditions expected to reduce salmon returns in coming years, protecting coho habitat is vital for their continued recovery.

"Oregon coast coho are still on life support, and their recovery depends on protecting and restoring the rivers and streams these fish depend on to feed and breed," said Dr. Chris Frissell, former Oregon State University salmon biologist and Senior Staff Scientist with The Pacific Rivers Council. "Now is no time to abandon the vital habitat protection for these fish under the Endangered Species Act." Glen Spain, with the Pacific Coast Federation of Fishermen's Associations, said, "Now is not the time to slack off on habitat protections for coho salmon, or we risk another Klamath-type crisis. Eliminating these protections shifts the conservation burden onto the backs of fishermen, without protecting the rivers and streams the coho depend on. Without federal habitat protections, there is no assurance the coho will recover or that draconian fishing restrictions will ever be lifted." Dr. Jack Williams, Trout Unlimited added, "Good quality freshwater habitat is the backbone that supports coastal coho populations during these times of changing ocean conditions. Removing federal habitat protections now will only undermine the progress that's been made."

“We are not certain what will be the full biological implications for Pacific salmon production over the next few years, but we are relatively confident that for some, such as Oregon Coast coho, the negative effects could be dramatic,” NOAA scientists warned in a 2005 memo to NOAA Fisheries Regional Director Bob Lohn. “The various indicators developed by the [NOAA Fisheries Science] Center scientists suggest that recent ocean conditions will result in low returns of Oregon Coast and Columbia River salmon for this year and possibly for the next few years.”

According to Earthjustice, coastal coho runs have sharply declined from a mild surge in 2002, and numbers still fall short of full recovery. Commercial fishermen worry they will never see a return of their once profitable coho fishing seasons if numbers plummet due to further habitat loss. Historically, more than two million coho salmon spawned in Oregon’s coastal rivers. The 1990s brought consistently low coho returns, which bottomed out at about 14,000 in 1997, a decline of more than 99 percent from historic levels. Coast coho returns recovered in the early 2000’s, and peaked at more than 200,000 in 2002. But since 2003, coho returns have declined. The rebound between 2001 and 2003, they say, does not justify removing “crucial safeguards” from fully one-third of prime coho habitat.

### Snake River Salmon

On May 23, Judge James Redden ruled the 2005 Upper Snake River Biological Opinion (BiOp) was “arbitrary and capricious, and invalid under the ESA” because it did not consider the impact of the upper Snake River irrigation projects together with the lower Snake and Columbia river dams. “NOAA, BOR, and the Corps chose not to put the biological needs of endangered salmon first when they [consulted] separately on the upper Snake River water projects and the down-river dam operations. The agencies’ decision was not made to benefit endangered salmon, but rather to preserve and secure the rights of various water users for irrigation water, which could have been used to augment flow to benefit salmon runs.” Similarly, last year, Judge Redden invalidated the 2004 Lower Snake River BiOp, sending it back to be rewritten. Both new opinions are due by February 2007.

Reacting to Judge Redden’s ruling, the Idaho congressional delegation made the following statement: “Let there be no mistake: We will protect Idaho’s water and the Nez Perce Agreement.... Once again, a federal judge is trying to run the river with blatant disregard for the critical needs of the Northwest. He is clearly advocating for one side while ignoring the necessary balance between people and the environment. Not only does this ruling jeopardize the careful and long collaboration process between the federal, state, and local governments and the Tribes, but it also jeopardizes the potential for a long-term solution. We do note that the judge put the remand of the Upper Snake and Federal Columbia River Power System Biops on the same schedule and agreed they should remain segmented. With these objectives in mind, we will watch very carefully the way that the region responds to the judge’s ruling, particularly with regard to the way the remand order is implemented.”

Environmentalists praised the decision. Michael Garrity, American Rivers, said, “This decision exposes the inadequacy of the federal government’s salmon plan and lays the groundwork for a real solution that will recover salmon, protect farmers and communities, and ensure a stable, reliable Northwest energy system. It’s time for [the] federal government to honestly assess how much water the Bureau’s upper Snake River storage reservoirs must provide to protect salmon and steelhead as they pass the four high-cost, low-value lower Snake River dams. We believe that there is a solution that allows Idaho farmers to keep their water and that recovers Snake River salmon and steelhead, and it is removing the four high-cost, low-value lower Snake dams. Those who insist that these four dams remain in place are increasing the likelihood that more Idaho water will be needed to help salmon get downstream.”

### Compliance Costs

On July 19, the House Resources Committee's Water and Power Subcommittee, chaired by Rep. Richard Pombo (R-CA), approved the Endangered Species Compliance and Transparency Act (H.R. 4857) introduced by Rep. Cathy McMorris (R-WA) to require that the federal power marketing administrations list the direct and indirect cost estimates associated with Endangered Species Act (ESA) compliance for their customers. Rep. McMorris said, "This bill is the first step in ensuring more transparency for our energy consumers. Most people are unaware that ESA related costs, such as salmon recovery, contribute to higher energy prices...." Rep. Pombo said, "There is no more unpredictable regulatory cost to western electricity ratepayers than ESA compliance.... Consumers deserve to know where their money is going." Bonneville Power Administration (BPA) ESA compliance costs are the highest in the Nation. One mandated spill in 2004 cost \$75 million in lost hydropower revenue, and the Washington Post estimated a mandated summer spill amounted to spending \$3.85 million per chinook salmon saved, according to Rep. McMorris' opening statement.

The Subcommittee held a field hearing on related issues in Pasco, Washington on July 7. Karen Durham-Aguilera, U.S. Army Corps of Engineers, Director, Programs Directorate, Northwest Division, testified that the Corps spends about \$140 million annually for capital improvements for fish passage and operation and maintenance (O&M) of fish facilities. The cost is covered by Congressional appropriations, with the BPA reimbursing the U.S. Treasury for the "power share" of the expense, which averages about 80% of the total cost for Columbia River Basin salmon and steelhead capital expenditures. "The power share of operations for fish and maintenance of fish facilities is direct-funded by BPA," she said. In 2006, \$33 million was direct-funded, and Congress appropriated around \$11 million. About \$40 million each year is spent on O&M for fish passage and transportation systems. In total, under the Columbia River Fish Mitigation (CRFM) Project, initiated in 1988, about \$1 billion had been spent by the end of FY2005, with another \$600 million estimated to complete the project."

### Platte River Recovery Program

On September 28, Interior Secretary Dirk Kempthorne signed off on a proposed \$317 million basin-wide Platte River Recovery Implementation Program designed to provide habitat for four threatened and endangered species. In signing the Record of Decision (ROD) for the Final Environmental Impact Statement (FEIS) Kempthorne said, "The Platte River Basin has seen more than two decades of conflict over water use and endangered species. This recovery program is an outstanding collaborative effort among interest groups to cooperatively address the needs of endangered species and ensure that current uses of basin water can continue."

The ROD authorizes the Bureau of Reclamation and the U.S. Fish and Wildlife Service (FWS), subject to required congressional authorization and appropriations, to participate in funding the program. It also appoints the Platte River Recovery Program Governance Committee to act as the recovery implementation team. The preferred alternative described in the FEIS and approved in the ROD would improve habitat for the target species in the Central Platte Habitat Area (along the Platte River from Lexington to Chapman, Nebraska). It involves efforts to reduce use to help meet FWS "recommended target flows in the central Platte River by about 130,000 to 150,000 acre-feet on an average annual basis, primarily by retiming river flows to improve habitat conditions in the spring, summer, and early fall." This will be achieved by leasing or acquiring land in the Central Platte Habitat Area from willing sellers and restoring habitat, focusing primarily on restoration of wet meadow areas and areas of wide unvegetated river channel. It will also test the assumption that managing flow in the Central Platte River also improves habitat for the pallid sturgeon in the Lower Platte River.

“The initiative is based on significant scientific research and analysis, including a review and endorsement by the National Academy of Sciences,” Kempthorne explained. “By pooling resources and coordinating the restoration effort, the program provides a cost-effective way to meet each water user’s obligations under the Endangered Species Act. It removes the uncertainty for water users about what will be required to comply with the ESA for the whooping crane, interior least tern, piping plover, and pallid sturgeon.”

The Platte River Recovery Implementation Program was formulated by the Platte River Governance Committee, made up of federal and state representatives, water users and environmental groups. The Governors of Colorado, Nebraska and Wyoming must also sign the agreement. Further, it will require enactment of federal authorizing and funding legislation. The federal government would provide half the funding, with the other half contributed by the three states through cash and in-kind contributions of water and lands. The estimated total cost over the first 13-year period is \$317 million.

An Executive Director will be hired to guide day-to-day operations and supervise staff and contracts. The Governance Committee will contract with a financial management agency to hold and disburse the funds contributed by the program’s partners and a land interest holding agency to hold title to Program lands. The FEIS process began in 1997. The Record of Decision is posted along with other Platte River Recovery implementation Program documents at <http://www.platteriver.org>. (Press Release, Office of the Secretary, 9-28-2006)

In October, Nebraska Governor Dave Heineman, signed the Platte River Cooperative Agreement. Colorado Governor Bill Owens, Wyoming Governor Dave Freudenthal, and Heineman said, “We have a rare opportunity to work with water users and the environmental community to achieve federal objectives for the Endangered Species Act while respecting the need to preserve each of our states’ agricultural economies.” Together the three states would contribute \$130 million in land and water. Reportedly, 80,000 acre-feet of water and 26,500 acres of land in Wyoming and Nebraska. Colorado is expected to add \$24 million in cash, and Wyoming \$6 million. (Lincoln Journal Star, 10-31-06)

On December 6, Secretary of the Interior Dirk Kempthorne signed the Platte River Recovery Program Implementation Cooperative Agreement, setting in motion efforts to protect and restore habitat for threatened and endangered species while also ensuring current uses of water continue. According to Mark Limbaugh, Interior’s Assistant Secretary for Water and Science, “This agreement has been several years in the making and represents a tremendous amount of collaboration by many who are concerned about the future of the species and the future of water projects.” Earlier, he signed a record of decision for a final environmental impact statement covering the agreement.

In the absence of an agreement, ESA consultation requirements would have to be met separately for each of the hundreds of federal and private water projects in the basin. “That would be vastly more expensive and certainly less effective in recovering the species,” said Limbaugh.

Representatives from the three states, water users, environmental groups, and federal agencies will form a governance committee responsible for implementing the agreement hiring an executive director, contracting with a financial management entity to hold and disburse funds, and with a holding company to hold title to program lands. (DOI Press Release, 12-6-06)

### Expenditures by Speices

Of note, the U.S. Fish and Wildlife Service (FWS) released a 2006 expenditure report required by Congress detailing spending for the conservation of threatened and endangered species by state and federal agencies for FY2004. The report illustrates how money is distributed. Total spending was \$1.4 billion (down from \$2.4 billion in FY2001). Seven of the top ten species were fish, and \$396 million was spent on salmon, steelhead and the pallid sturgeon - nearly one-third of total spending. Reportedly, about 8% of 1,340 listed species get 90% of the money. Chinook salmon topped the list with over \$161 million, followed by steelhead, the Stellar sea lion, coho salmon, bull trout, sockeye salmon and red-cockaded woodpecker. The pallid sturgeon - at the center of the debate over the Corps of Engineer's operation of the Missouri River system - came in 8th with \$13.3 million - followed by chum salmon and the right whale.

### Reauthorization Legislation

Interior Secretary Dirk Kempthorne is expected to push changes to the Endangered Species Act (ESA) next year. In 1998, then Senator Kempthorne (R-ID) sponsored bipartisan legislation S. 1180 to amend the act. It made it to the Senate legislative calendar, but no further, as legislative action stalled in the House. At his summer confirmation hearing, he said that he looked forward to "...again being at the table discussing ways to improve the act and make it more meaningful in helping the very species that we're trying to save." The ESA was last amended and reauthorized in 1988, and for nearly two decades continued program spending has been authorized year-to-year under appropriations acts. Environmental groups are leery of changes.

The Endangered Species Coalition (ESC), a non-partisan group working with conservation and environmental organizations "as diverse as the species we are working to protect," supports a strong reauthorization bill focused on recovery, "not just the survival of listed species." But it opposes any bill that would weaken ESA protections. H.R. 3824, the Threatened and Endangered Species Recovery Act, passed the House on September 29, 2005. ESC opposed the bill, introduced by Rep. Richard Pombo (R-CA), as deceptive and intended to "dismantle the core protections of the Endangered Species Act..." ESC also opposed S. 1180, and with regard to Kempthorne, Liz Godfrey, ESC Program Director, says, "Given his record, it's potentially dangerous to open up the ESA. I don't think [the act] needs to be changed. It needs to be funded. It has been consistently under funded over the course of the years."

On September 26, Secretary Kempthorne announced the release of more than \$67 million in ESA Section 6 grants to 27 states to fund conservation planning and acquisition of vital habitat for threatened and endangered fish, wildlife and plants. The grants, awarded through the Cooperative Endangered Species Conservation Fund (CESF), will benefit species ranging from orchids to bull trout across the United States. "These grants are incredibly important tools to conserve threatened and endangered species," said Secretary Kempthorne. "Our ability to successfully conserve habitat for imperiled species depends on long-term partnerships and voluntary landowner participation. These grants provide the means for States to work with landowners and communities to conserve habitat and foster conservation stewardship efforts for future generations." (FWS Press Release, 9-26-06)

The CESF this year provides \$7.5 million through the Habitat Conservation Planning Assistance Grants Program, \$46 million through the Habitat Conservation Plan Land Acquisition Grants Program and \$13.9 million through the Recovery Land Acquisition Grants Program. These

three programs help reduce potential conflicts between the conservation of threatened and endangered species and land development and use. Under the Habitat Conservation Plan (HCP) Land Acquisition Program, the Service provides grants to states or territories for land acquisition associated with approved HCPs. The grants are targeted to help landowners who want to undertake proactive conservation work on their lands to conserve imperiled species. HCPs may also be developed by a county or state to cover certain activities of all landowners within their own jurisdiction and may address multiple species. There are more than 650 HCPs currently in effect covering 600 separate species on approximately 41 million acres.

Funding for HCP Land Acquisition grants this year include \$12 million to purchase habitat to support the Western Riverside County Multi-species HCP in California and permanently protect 578 acres of habitat for eighteen federally listed species. The HCP Planning Assistance Program provides grants to states and territories to support the development of HCPs through funding of baseline surveys and inventories, document preparation, outreach, and similar planning activities. In Montana a \$574,334 grant will enable the Montana Department of Natural Resources to complete an HCP that covers half a million acres of state lands across 25 counties in northwestern Montana. This HCP will ultimately protect five federally listed species and two state sensitive species: Canada lynx, grizzly bears, bull trout, bald eagles, gray wolves, westslope cutthroat trout and Columbia River redband trout. This project will set a statewide precedent for balancing forest practices and public land management with species conservation.

The Recovery Land Acquisition Grants Program provides funds to states and territories to acquire habitat for endangered and threatened species with approved recovery plans. One of this year's grants will provide \$1.8 million to preserve 3,148 acres in the South Kona District of the Island of Hawaii located within a core region identified for wildlife conservation in the Hawaii Comprehensive Wildlife Conservation Strategy.

## **Environmental Protection Agency**

### *WaterSense*

On June 12, EPA launched WaterSense, a new water efficiency program (similar to the Energy Star program), to help educate American consumers on making smart water choices that save money and maintain environmental standards without compromising performance. Administrator Stephen L. Johnson said, "Efficient products and informed consumers lead to smart water use. EPA's WaterSense program will provide water solutions.... WaterSense just makes sense. WaterSense advances President Bush's cooperative conservation goals through education, not regulation - spreading the ethic of water efficiency and promoting the tools to make wise water choices."

The WaterSense program will raise awareness about the importance of water efficiency, ensure the performance of water-efficient products and provide good consumer information. The WaterSense label will be easily identified on products and services that perform at least 20% more efficiently than their counterparts. Manufacturers can certify these products meet EPA criteria for water efficiency and performance by following testing protocols specific to each product category. In addition, products will be independently tested to ensure EPA specifications are met. Labeled products will be available early next year.

According to EPA, household water leaks cost consumers 8% of their water bill. At least

30% of water used by household irrigation systems is lost through wind evaporation and improper design, installation or maintenance. EPA's announcement states, "The average household adopting water efficient products and practices can save 30,000 gallons per year - enough to supply a year of drinking water for 150 of their neighbors."

On October 27, the Environmental Protection Agency announced it is inviting organizations that share a commitment to water use efficiency to become partners in its WaterSense program in a voluntary public-private partnership to promote and market water-efficient products, programs and practices. Now promotional partners, certifying organizations and certified irrigation professionals may join, and later manufacturers, retailers and distributors of WaterSense products will be added. Specifications and guidelines are on-line at [www.epa.gov/watersense](http://www.epa.gov/watersense).

"Landscape irrigation professionals impact more than half of the water delivered by utilities in many communities. As pressure grows to ensure that water supplies are used wisely, water utilities and their customers will come to rely on WaterSense irrigation professionals..." says Jill Hoyenga, Eugene Water & Electric Board (Oregon). "As EPA moves forward with actual certifications, significant water savings can be achieved...in properly designed and installed irrigations systems," according to Tom Penning, President of Irrrometer Company. "This is a great first step for the EPA WaterSense program," said Ron Wolfarth, Rain Bird Corporation. "The certification of irrigation training programs focuses on the expertise needed to properly design, install and operate efficient irrigation products in order for the consumer to realize their water conserving benefits." Liz Birnbaum, American Rivers, agreed, "It's a big step forward for our rivers and groundwater.... [It] will give consumers and communities the information they need to use water more effectively."

## **Farm Bill**

### *Conservation Reserve Enhancement Program*

On April 21, U.S. Department of Agriculture Secretary Mike Johanns celebrated Earth Day by signing two Conservation Reserve Enhancement Program (CREP) partnerships in Wiggins, Colorado totaling \$91.6 million that will conserve water and improve wildlife habitat. "Through these CREP agreements covering 65,000 acres in eastern Colorado, farmers and ranchers will conserve water use while enhancing habitat for declining fish species and other wildlife," said Johanns. "I'm proud to celebrate Earth Day by expanding our partnerships with farmers and ranchers who are among America's very best stewards of the land." Colorado Department of Natural Resources Executive Director Russell George, Colorado Agriculture Commissioner Don Ament and Rep. Marilyn Musgrave (R-CO) participated in the signing ceremony.

Colorado's 35,000-acre Republican River CREP will reduce agricultural irrigation water use by 5% on 30,000 eligible acres, and the planting of native grass and other vegetative covers throughout the Republican River Basin are projected to reduce soil erosion by 374,000 tons and reduce the application of agricultural chemicals by 2,900 tons. When fully implemented, the CREP will restore 30 miles of riparian habitat and 500 wetland acres that will improve habitat for targeted fish species, including the stonecat, suckermouth minnow, brassy minnow and plains minnow.

The Colorado High Plains CREP will increase populations of ring-necked pheasants and other ground-nesting birds by planting vegetation to provide habitat, food plots and cover on 30,000 eligible acres. On the enrolled acres, the CREP will boost public access and recreational

opportunities, such as hunting and bird watching. The High Plains CREP will reduce soil erosion by 160,000 tons each year, while reducing the application of chemicals by 750 tons over a 15-year period. This will improve water quality for eastern Colorado. The High Plains CREP will cost \$25.3 million over 15 years, with USDA paying \$19.9 million and Colorado funding \$5.4 million. Under both CREPs, landowners may sign-up eligible cropland. Enrolled land will remain under contract for 14-15 years.

On Earth Day, USDA also announced the release of \$115.1 million in Community Water and Wastewater Infrastructure program loans and grants. Johanns highlighted investments in 28 states to assist over 50 rural communities with environmentally sound waste disposal and safe drinking water systems. Funding for these projects includes \$55.1 million in loans and \$59.9 million in grants. There is \$3.5 million for technical assistance and training grants to go to nonprofit organizations to provide help on a wide range of issues relating to the delivery of water and waste disposal services. The Solid Waste Management Grants are made to public and private nonprofit organizations to provide technical assistance and training to associations to reduce or eliminate pollution of water resources and improve planning and management of solid waste facilities.

Johanns also cited significant progress towards the Nation's Wetlands Initiative Goal with President Bush's pledge to restore, improve and protect 3 million acres of our nation's wetlands in five years. Over 1.7 million acres of wetlands have been restored, created, protected or improved. By the end of FY2006, USDA will have restored, created, protected or improved nearly 400,000 acres of wetlands through voluntary conservation programs on private lands. USDA funding for wetlands totals nearly \$270 million.

On May 19, Secretary Johanns and Idaho Lt. Governor Jim Risch (on behalf of Governor Dirk Kempthorne) signed a \$258 million Idaho Conservation Reserve Enhancement Program agreement to reduce irrigation water consumption, improve water quality and improve fish and wildlife habitat in Idaho's Snake River Basin. By enrolling up to 100,000 acres of irrigated cropland above Idaho's Eastern Snake Plain Aquifer, the program is expected to reduce irrigation water use by up to 200,000 acre-feet annually, increasing ground water levels and reducing the application of agricultural chemicals and sedimentation from runoff. Permanent vegetative cover will provide habitat for many wildlife species.

"The Idaho CREP's goals of conserving water and reducing contaminants highlights President Bush's commitment to conservation," said Johanns. "By establishing native grassland habitat, participants will increase wildlife populations and groundwater quality, while reducing irrigation. I strongly encourage Idaho farmers and ranchers to participate in this important conservation program that protects our environment. This is a winning agreement for all of Idaho," said Idaho Lt. Governor Jim Risch. "The agreement benefits our agriculture community and protects the environment. After extensive research, we have determined that this unique state-federal partnership will result in better water flows for spring users, improved water quality for everyone and an increase in wildlife habitat. At the same time, this agreement will protect the income streams of our rural communities that depend on agriculture...."

The Eastern Snake River Aquifer CREP Project area will include all or parts of nineteen counties, and three more may be eligible "if the total CRP enrollment drops below 25 percent of the County's total cropland before the CREP project reaches the 100,000 acre enrollment target." The estimated \$258 million cost over a 15-year period will be shared by USDA (\$183 million) and the State of Idaho (\$75 million).



Over the term of the contracts, CREP participants receive incentive payments as applicable and cost-share assistance for approved conservation practices, such as cover grasses. USDA will provide annual payments based on irrigated land rental rates for the life of the contracts. The State of Idaho will provide incentive cost-share payments for CREP enrolled land and buy out water rights on other land in the CREP project area.

CREP is a federal-state cooperative conservation program that addresses targeted agricultural-related environmental concerns. With the Idaho CREP in place, USDA now has 36 CREP agreements with 28 states. Nationwide, landowners on 31,646 farms participate in various state CREPs, converging 807,343 acres, including 88,072 in wetlands. CREP is part of the Conservation Reserve Program (CRP), USDA's largest and most effective private-lands conservation program, with more than 36 million acres enrolled. This year marks the CRP's 20th anniversary.

### House Hearings

The House Agriculture Committee held a series of hearings in and out of Washington, D.C. on the future for the Farm Bill with scores of witnesses ranging from former U.S. Secretaries of Agriculture to producers, processors and suppliers. The testimony covers a wide range of issues, including world trade policy, nutrition, commodity and conservation programs, as well as biofuels. With respect to reauthorization of the Farm Bill, opinions vary with some calling for a one-two year extension of current authorities, while others prefer a comprehensive reform package or at least targeted changes to address their particular concerns.

Bob Stallman, President of the American Farm Bureau Federation, said, "U.S. farm policy should continue to help level the playing field with assistance to America's farmers until trade negotiations achieve a truly fair world market." He added, "The overall agricultural economy is in reasonable fiscal shape. Certainly there are individual producers who face challenges...with the storms and fires of the last two years and those who are now working through years of drought, as well as those who have lived through hurricanes and too much moisture." Further, he called the 2002 Farm Bill the "greenest" in history in terms of authorized conservation funding that "will benefit everyone through improved soil, water and air quality and wildlife habitat.... Our farmers and ranchers have been prudent managers of our country's natural resources...[and] have taken great strides to improve their environmental performance." There is general support for Farm Bill conservation programs, as a compliment to commodity programs.

Greg Shelor a sorghum producer from Minneola, Kansas testified at a September 20th full Committee hearing that only "a few Kansas farmers have even been allowed to apply for conservation programs under the Conservation Security Program (CSP) because of the limited geographical areas approved...." Representing NSP, national sorghum producers, he highlighted sorghum as a "conservation crop because it uses less water and works very well on marginal lands." He applauded the Committee for giving "serious consideration to the future of water supplies in the semi-arid regions of the Plains... by creating the Ground and Surface Water Conservation Program as part of the Environmental Quality Incentives Program (EQIP). However, more can and must be done to conserve water.... NSP is concerned that the demand for water for both agriculture and non-agriculture use could create a climate of tension that is not productive for either group."

Mr. Shelor referred to a National Water Research Institute (NWRI) report that estimates 25% of the world's population will face water shortages by 2025, and suggests that 50% of the future increase in water demands can be met by "increasing the effectiveness of irrigation and by growing

more water-use efficient crops like sorghum.” He adds, “Unfortunately, concentrating solely on improving irrigation technologies and increasing efficiencies does not necessarily translate into less water usage.... Overall, NSP believes that Congress and USDA need to emphasize water quantity, as part of water management, in both current and future conservation programs.”

He noted USDA research has found sorghum uses about 1/3rd less water than either corn or soybeans, and 15% less water than wheat. He stated, “Agriculture uses approximately 95% of the water drawn from the Ogallala Aquifer.... We believe that the best way to conserve water is to lower the amount of water used within an agricultural system, not to just improve irrigation delivery technologies.... NSP members believe that an incentive to compensate farmers for changing to a less water intensive crop would result in significant water conservation.”

## **Federal Reserved Water Rights**

### *Katie John v. U.S.*

On July 14, the State of Alaska filed its opening brief in *Katie John v. U.S.*, a case that was initially filed in January 2005. Alaska is challenging regulations implementing an earlier Katie John decision that interpreted the federal Alaska National Interest Lands Conservation Act (ANILCA; P. L. 96-487, 94 Stat. 2371). ANILCA provides for subsistence use of Alaskan public lands by rural Alaskan residents. A 1995 Katie John decision interpreted this provision as allowing preemption of State fish and wildlife management measures and exclusion of non-rural hunters and fishers on “federal public lands,” including waters in which there is a federal reserved water right (FRWR).

Following the 1995 decision, in 1999, the federal government attempted to use the rulemaking process (rather than a judicial process), to conclusively establish and exercise a FRWR and to treat State lands as “federal public lands” in Alaska. David Marquez, Alaska Attorney General, states, “The bypassing of the judicial process to unilaterally establish federal property interests through rulemaking is an unprecedented and statutorily unauthorized expansion of federal authority undermining states' rights and violating basic due process principles.”

Alaska asserts that the federal government has not complied with any of the traditional requirements for establishing a FRWR, and it is seeking a judicial determination of the “ground rules” for the establishment of a FRWR. Alaska contends that the federal agencies do not have authority to establish a FRWR unilaterally through rulemaking, and that they must comply with the elements of the FRWR Doctrine as explained by the Supreme Court. In 2005, Alaska Governor Frank H. Murkowski stated that the case “simply represents my commitment to vigorously defend Alaskans against an over-reaching federal government.”

### *High Country Citizens' Alliance v. Norton*

On September 11, 2006, Federal District Court Judge Clarence Brimmer set aside a U.S. Department of Interior agreement with the Colorado Water Conservation Board concerning federal reserved water rights in the Black Canyon of the Gunnison National Park. The agreement which the Department of Interior and Colorado Water Conservation Board negotiated in 2003, attempted to end a controversy quantifying the National Park's federally reserved water rights, which has been ongoing for nearly thirty years. The parties agreed that the National Park Service would relinquish a previously asserted reserved right to peak and shoulder flows above 300 cubic feet per second (cfs), and claim a year-round base flow of 300 cfs with a 1933 priority date (the year that the Black Canyon

of the Gunnison was designated a National Monument). The parties also agreed that the Board would seek to appropriate conditional peak and shoulder flow water under Colorado Law with a 2003 priority date. The situation is complicated by the significant demands for water on the Gunnison River, including water to meet other federal purposes such as the Aspinall Unit of the Colorado River Storage Project Act of 1956. Both the Department of Interior and State of Colorado had hailed the agreement as a creative solution.

However, in *High Country Citizens' Alliance v. Norton*, environmental groups challenged the agreement in federal court, and Judge Brimmer ordered that the agreement be set aside and remanded the matter back to the National Park Service for further proceedings. Judge Brimmer set the agreement aside for four reasons. First, he held that the agreement, specifically the relinquishment of a water right with a 1933 priority date was a major action requiring compliance with the National Environmental Policy Act. Second, the agreement unlawfully delegated the determination and acquisition of proper peak and shoulder flows to the State of Colorado. Third, by claiming less water than is required to meet the purposes for which the Park was created, the agreement unlawfully disposed of federal property without congressional intent. Finally, Interior acted beyond its discretion by relinquishing a 1933 priority to the full quantity of water necessary to meet the purposes of the Park.

On December 18, the U.S. Department of Justice filed a notice of appeal in *High Country Citizens' Alliance v. Norton*. The notice of appeal merely preserves a right to appeal a decision, and does not automatically require a party to do so. Department of Justice spokeswoman Cynthia Magnuson said that the agency will likely file the appeal with the 10th Circuit in Denver by early January 2007.

## **Indian Water Rights**

### *Assiniboine & Sioux Tribes/Fort Peck*

On December 18, President Bush signed S. 1219, a bill authorizing the Assiniboine and Sioux Tribes of northeastern Montana to lease or otherwise convey water to the Dry Prairie Rural Water Association. The two tribes, pursuant to the Fort Peck/Montana Compact of 1985, hold a Missouri River water right of nearly one million acre-feet (Maf). The tribal-state water rights compact was one of the first in the Nation. Approved by the Montana Water Court, it is binding on all parties, including the United States. The tribes and association are set to enter into an agreement providing 2,800 acre-feet of the tribes' water to Dry Prairie. According to Senator Conrad Burns (R-MT), the bill clarifies Interior's authority to approve the Fort Peck/Dry Prairie water use agreement.

Congress passed the Fort Peck Reservation Rural Water System Act authorizing the development of water resources to benefit both the Fort Peck Tribes and non-tribal communities neighboring the reservation in 2000. Under that legislation, the federal government and Dry Prairie would fund a \$200 million project to divert up to 6,000 acre-feet annually from the Missouri River to provide "desperately needed drinking water," says Senator Burns. Of note, at the point of diversion, the average annual flow of the river is near 7.5Maf. The tribes will provide the water for the entire system, and S. 1219 provides the "legal clarity" necessary to move forward.

The federal government will pay that portion of project costs allocated for the reservation, which has a population of about 10,700 and approximately 5,800 are members of the tribes. S.1219 clarifies the Fort Peck tribes' authority, with the Secretary of Interior's approval, to lease or make

other temporary conveyances of water to Dry Prairie without monetary consideration for up to 100 years to meet off-reservation water supply needs of the Fort Peck Reservation Rural Water System. Nothing in the legislation authorizes a permanent alienation of the tribes' water rights. The Administration supported passage of the bill, but asked that any lease term be limited to 50 years. Last year, Bill Rinne, Deputy Bureau of Reclamation Commissioner, also testified suggesting that the Secretary's approval was not necessary, and at a minimum language limiting Interior's liability should be strengthened. S. 1219 states: "The Secretary shall not be subject to liability for any claim relating to any compensation or consideration [or lack thereof] received by the Tribes under the lease or conveyance." According to Burns, the project "...will finally enable the Fort Peck Tribes to receive critical benefits from its water settlement with the United States and the State of Montana." It will also help meet the drinking water needs of Dry Prairie Rural Water Association customers. The federal government will pay 76% of the non-Indian project costs, with the non-federal sponsors paying 24%.

## **River Basins**

### *Colorado River Basin*

#### *Shortage Sharing Agreement*

In a February 3 letter to Interior Secretary Gale Norton, the Seven Colorado River Basin States outlined a conceptual shortage sharing agreement, though some details will take time to work out, to be included within the scope of an environmental impact statement (EIS) for proposed system operations under low reservoir conditions. Norton had given the states a February 1 deadline, and reportedly has said, "I am pleased that the basin states have a preliminary recommendation that they can provide us. I appreciate their dedication to working on a long-term solution and recognize that it took much time and effort."

The letter states, "Our recommendation is designed to provide input for the Department's consideration as it develops additional operational and water accounting procedures to: (1) delay the onset and minimize the extent and duration of shortages in the Lower Division States; (2) maximize the protection afforded the Upper Division States by storage in Lake Powell against possible curtailment of Upper Basin uses; (3) provide for more efficient, flexible, responsive and reliable operation of the system reservoirs for the benefit of both the Upper and Lower Basins by developing additional system water supplies through extraordinary conservation, system efficiency and augmentation projects; (4) allow the continued development and use of the Colorado River resource in both the Upper and Lower Basins; and (5) allow for development of dedicated water supplies through participation in improvements to system efficiency and clarification of how to proceed with development of non-system water reaching the Lower Basin mainstream. It is our position that implementation of these operational and accounting procedures can be accomplished without modification of the Long Range Operating Criteria or...the law of the river."

It adds, "An agreement between Basin State water managers and users will be necessary to put in place additional terms upon which they have reached common understanding. We intend that this agreement be finalized while Reclamation is preparing the draft EIS, and be executed as soon as practicable. We are including with this letter a draft version of the agreement..., to memorialize our current understandings and to provide you the benefits of our thoughts at this time. [P]lease recognize that the parties are still actively working on the matters addressed..., and contemplate additional development and refinement of the agreement. We recognize that timely execution...is necessary in order to allow funding of certain efficiency projects to go forward."

Further, "The attached proposal also addresses the States' recommended approach to implementation of shortages pursuant to the U.S.-Mexico Treaty of 1944. We request that the Department of the Interior initiate, at the earliest appropriate time, consultation...on implementation of Treaty shortages. We further request the opportunity to consult with Interior and State Department officials on this issue as the federal government formulates its approach to any bi-national consultation with Mexico." The letter is signed by nine officials from seven states, including WSWC members Herb Guenther (AZ), Rod Kuharich (CO), John D'Antonio (NM), Larry Anderson (UT) and Pat Tyrrell (WY), as well as Gerry Zimmerman (CA), Scott Balcomb (CO), and Pat Mulroy (NV) and Richard Bunker (NV).

### *Weather Modification*

On June 19-21, the Water Education Foundation facilitated a Colorado River Basin Weather Modification Workshop in Boulder, Colorado. Some sixty state and federal officials, scientists and water managers were invited. Rod Kuharich, Director of the Colorado Water Conservation Board, welcomed participants and explained weather modification is one of a number of elements the Seven Basin States have agreed to consider to augment river flows. Since the late 1970s, Colorado has permitted weather modification activities, and recent changes in the law now allow the state to accept donations to support cloud seeding operations, clearing the way for Lower Basin States to fund such work. Colorado has some 20 years experience with cloud seeding around Vail and Grand Mesa, but concerns remain over its effectiveness, targeting specific areas, and any "shadow effect" that might inequitably affect other areas. Colorado's weather modification statute claims all the water in the clouds for the state, though that may not preclude legal challenges. Until the Seven Basin States sign an agreement on the Colorado River, there will be no new program.

A "white paper" authored by Tom Ryan, Metropolitan Water District of Southern California, and reviewed by representatives of the North American Interstate Weather Modification Council, Desert Research Institute, U.S. Bureau of Reclamation and Colorado Water Conservation Board states: "It is estimated that cloud seeding six major runoff-producing areas within the Colorado River Basin could produce between 1.1 and 1.8 million acre-feet (Maf) in the Upper Basin (approximately 10% of the average annual stream flow) and an additional 830,000 acre-feet in the Lower and adjacent basins. Of the total, ...approximately 1.7 Maf would be available to reduce deficits and meet new demands." Such estimates are based on past experiences, including successful programs in Colorado and Utah that have yielded increases in precipitation of 7-20% at costs less than \$20/acre-foot. As one reviewer told the group, "Seeding is believing!"

Not everyone is as enthusiastic. Key uncertainties involve precipitation microphysics, cloud dynamics, cloud modeling and seeding issues related to program design, execution and evaluation. The natural variability inherent in precipitation patterns is a major hurdle to tracing and evaluating the effectiveness of seeding. Moreover, changes in the atmosphere, climate and thermodynamics effect precipitation and seeding activities. Some studies suggest increasing air pollution and related aerosols, such as sulfate (the sources of which are about 70% anthropogenic) may have "muted" the impact of some ongoing seeding activities in the basin. It appears that the super cooled liquid physics related to precipitation operates much more efficiently in unpolluted environments.

There are also legal and political obstacles. Mark Limbaugh, Assistant Secretary of Interior for Water and Science, noted the Administration's opposition to a bill (S. 517) introduced by Senator Kay Bailey Hutchison (R-TX) to establish a federal weather modification program and policy, a bill the WSWC supports. He referred to a letter from the Office of Science and Technology Policy

(OSTP) raising concerns related to what some have termed "cloud rustling," and potential litigation that could result. Further, it is unclear who would be liable for any potential adverse consequences or threats to life and property from severe weather events that might be attributed to weather modification activities. He also noted implications for international relations and foreign policy, as well as national security. He also questioned redirecting limited federal research money away from improving weather forecasting and predicting severe weather events, which saves lives and property. As a result of such concerns, the Administration asked that further consideration of the bill be deferred pending a federal interagency discussion of the issues.

### *Colorado River Storage Project Act*

On October 19, the U.S. Bureau of Reclamation celebrated the 50th Anniversary of the passage of the Colorado River Storage Project Act (CRSP) at Glen Canyon Dam. Construction of four CRSP units and eleven participating projects was authorized by Congress on April 11, 1956, and signed by President Dwight D. Eisenhower (PL 84-485, 70 Stat. 105). "I often wonder if anyone then really knew how significant that moment would ultimately prove to be," said Mark Limbaugh, Assistant Secretary of Interior for Water and Science. "The CRSP Act provided both the legal foundation and impetus for the comprehensive development of the Upper Colorado River Basin. In all likelihood, without Glen Canyon Dam and the other CRSP storage units there would be a strong possibility that annual obligations to the Lower Basin could not be met without creating significant water shortages in the Upper Basin."

The special event commemorated the many CRSP contributions towards the growth and development of the southwestern United States. The CRSP Act provided for the initial construction of four basin dams, reservoirs, powerplants and transmission facilities including: Glen Canyon Dam on the Colorado River, between Arizona and Utah; Flaming Gorge Dam and Reservoir on the Green River in Utah; Navajo Dam on the San Juan River in New Mexico; and the Curecanti Unit on the Gunnison River in Colorado (later renamed the Wayne N. Aspinall Unit after the Colorado congressman). In addition, 21 participating projects were either authorized by CRSP or subsequent legislation. These developed hydropower and water resources for irrigation, municipal and industrial uses, and other purposes in the Upper Colorado River Basin. Sixteen projects have been or are being completed.

"The reach of the Act is amazing in that it anticipated the day when water demands, water shortages, population and economic growth would converge," added Limbaugh. "I am confident that fifty years from now, water managers and western historians alike will proclaim the Colorado River Storage Project Act as one of the seminal acts that shaped the development of the American West." CRSP powerplants generate power for more than 5.8 million people in six states, and revenues from power sales pay for operation and maintenance of the CRSP units and participating projects. CRSP reservoirs have a total active storage capacity of nearly 30.6 million acre-feet of water. (USBR Press Release, 10-19-06)

### *Drought Management*

On October 30, Interior Secretary Dirk Kempthorne met with state and local water users from the seven basin states to discuss water management issues related to the drought that has plagued the basin. In attendance were Gerry Zimmerman, Colorado River Board of California; Herb Guenther, Arizona Department of Water Resources; Dennis Strong, Utah Division of Water Resources; Pat Tyrrell, Wyoming State Engineer, John D'Antonio, New Mexico State Engineer; Pat Mulroy,

Southern Nevada Water Authority; Sid Wilson, Central Arizona Project; Jeff Kightlinger, Metropolitan Water District of Southern California; Assistant Interior Secretary Mark Limbaugh and Bureau of Reclamation Commissioner Bob Johnson. (Interior Press Release)

“The key issue for this river system, as it is for many other river systems around the West, is the competition and demand for a limited resource, and the need to find solutions to this demand that will meet both current and future needs,” said Kempthorne. “This is a tough job, and I look forward to working with you to find consensus to these issues.” The group discussed shortage-sharing arrangements and potential options for augmenting the Colorado system’s flows. Basin states continue to collaborate on a study, due to be completed next summer, of options that include weather modification, desalination and other emerging technologies. An Environmental Impact Statement (EIS) related to managing the system is also being developed.

### Columbia River Basin

On February 14, the Washington State Legislature passed House Bill 2860 creating a new Columbia River Basin Water Management Program. The bill directed the Department of Ecology (Ecology) to aggressively pursue development of water supplies to benefit both instream and out-of-stream uses through storage, conservation and voluntary regional water management agreements. The bill also required that Ecology complete a two-part report on the Columbia River’s water supply and forecast future water supply and demand requirements. One part consists of a Columbia River Water Supply Inventory, listing the conservation and storage projects available for acquiring water for instream and out-of-stream uses. It will be used to evaluate and rank projects for funding. The second part, a Long-Term Water Supply and Demand Forecast, looks at increased water demands due to population growth and the effect crop changes and global warming may have on water supply and demand. As required by the legislation, Ecology will update the water supply inventory annually and the long-term water supply and demand forecast every five years.

The law charges Ecology with developing water supplies to support new municipal, domestic, industrial and irrigation water rights. In addition, it gives priority to delivering surface water to the area served by the declining Odessa aquifer, and ensuring that some 300 water right holders on the Columbia River do not have their water supply “interrupted” or curtailed during low water years. The law also authorizes funding for storage and conservation activities designed to shore up instream water supplies and provide water for new out-of-stream uses.

The water supply inventory evaluates how much water is being diverted for out-of-stream uses in Washington and Oregon within a one-mile corridor of the river from the Bonneville Dam to the Canadian border in Stevens County. It examines how much water has been authorized for withdrawal by looking at existing water right data bases in both Washington and Oregon. It also takes into consideration data from the U.S. Geological Survey’s inventory of actual water use, conducted every five years, and presents findings from Washington State University (WSU) on future agricultural demand.

Current demands for water identified in the report range from an estimate of five million acre-feet (Maf) of actual use per year, up to a maximum of eight Maf of water authorized for diversion. Approximately one Maf of maximum use has been allocated by the state of Oregon. For perspective, annual runoff in the Columbia River averages 200 Maf as it enters the Pacific Ocean. Agricultural uses account for nearly 80% of authorized withdrawals within the one-mile management zone in Washington State, compared to just 7% for municipal and domestic uses. To help identify

future water needs and long-term water demands, the report “tallies up” how much water is being requested in pending water right applications and also examines growth projections made by municipalities and agricultural interests. Forecasts range from a relatively stable need for water over the next 20 years to a scenario that recognizes the potential for more than 750,000 acres of new irrigation if, for instance, the second half of the Columbia Basin Project were to be completed and a large storage facility were built. Based on the backlog of current applications for irrigation water rights on file with Ecology, some additional 60,000 acres of land could be irrigated if those water right requests were to be approved.

Under the Columbia River Basin Water Management Program framework, demands for new water will be met by improving how water is managed at existing projects, and making investments in new conservation and storage projects. Using information provided by the Washington Conservation Commission and local conservation districts, the report catalogs several thousand conservation projects that could provide water savings that might be allocated to new uses. New storage opportunities identified in the report cover both large facilities (one Maf or more) and smaller facilities (less than one Maf), opportunities for modifying existing storage facilities, as well as aquifer storage and recovery projects.

In August, the State of Washington formed a broad panel of interested parties to help launch its new water management program for the Columbia River to sustain growing communities, a healthy economy, and fish and healthy watersheds. Climate change and its impacts will be another component. Farmers, local government officials, tribes and environmental groups, joined with water, fish and power managers met in Ellensburg recently to inaugurate the Columbia River Policy Advisory Group.

The panel will provide advice as state agencies move forward to implement Washington’s Columbia River Water Management Program, passed in the 2006 legislative session with overwhelming support and a commitment of \$216 million. The historic water bill calls on Ecology to aggressively develop new water supplies and improve water management on the Columbia River to support stream flows for fish and new out-of-stream uses, such as farming, industry and municipal growth. It also allows for creativity and flexibility in achieving water resource solutions through voluntary regional agreements. One of the panel’s first tasks will be to help agencies develop priorities and criteria for funding conservation and storage projects. In addition, the group will play a key role in identifying “preferred alternatives” through the federal Columbia River Water Management Program Environmental Impact Statement (EIS) process. A draft EIS will be available for comment this fall.

“Success on the Columbia River can only be had through collaboration,” said Jay Manning, Director of the Washington Department of Ecology (DOE). “Each of these members brings an important perspective to the table that will serve us well as we implement this plan.... For too long we were locked in water wars. As vested partners, we’re ready to design a program where both the environment and the economy win.... We’ve got some looming deadlines. Supply and demand forecasts are due to the Legislature, projects need to be identified, and mechanisms for implementing innovative management tools - such as voluntary regional water agreements - need to be in place. These leaders are going to help us decide how to get the work done.” (DOE Press Release 8-28-06)

Among the panel members are representatives from: American Rivers; the Association of Washington Business; Benton, Grant and Stevens Counties; Bonneville Power Administration; City of Kennewick; Colville, Spokane, Umatilla and Yakima Tribes; Columbia Basin Development



League; Columbia-Snake Rivers Irrigation Association; East Columbia Basin Irrigation; Grant County PUD; Northwest Power and Conservation Council; Washington Department of Fish and Wildlife; Washington Rivers Conservancy; Washington State Conservation Commission; Washington State Farm Bureau; Water Policy Alliance; U.S. Army Corps of Engineers; U.S. Bureau of Reclamation; and U.S. Department of Commerce - NOAA Fisheries. The group will meet monthly over the next several months. More information on the Columbia River Water Management Program is available online at <http://www.ecy.wa.gov/programs/wr/cwp/crwmp.html>.

On November 16, the Washington Department of Ecology released a report that takes an initial look at how water from the Columbia River is being distributed now and how much water might be needed to support the region in the future. Written in two sections, the report includes a water-supply inventory, and a long-term water supply and demand forecast. It also identifies conservation and storage projects that might be used to meet future water needs. "These reports represent our first steps toward building a sustainable water supply program for Eastern Washington," explained Ecology Director Jay Manning. "Our job next year is to improve what we know about the demand for water, and develop specific projects that will benefit both in-stream conditions and provide water for farms and cities." The report is available online at [www.ecy.wa.gov](http://www.ecy.wa.gov), click on the "Managing our Water" icon. (DOE Press Release)

### Missouri River Basin

#### *North and South Dakota v. U.S. Army Corps of Engineers*

On January 17, Montana Attorney General Mike McGrath filed a friend-of-the-court brief with the United States Supreme Court, urging the Court to accept review of *North Dakota and South Dakota v. U.S. Army Corps of Engineers*, a case addressing the allocation of Missouri River waters between upstream and downstream uses. North and South Dakota filed their petition last year. "This is the latest in a long history of disputes about the handling of water resources along the Missouri," McGrath said. "We believe review by the Supreme Court is necessary so the concerns of smaller, upstream states like Montana and the Dakotas are given the same significance as those of larger, downstream states."

McGrath argues that the 8th Circuit Court in St. Louis incorrectly held that barge traffic and other commercial uses downstream have priority over agricultural and recreational uses in the upstream states. The brief notes that even the Army Corps of Engineers - the federal entity charged with managing the river - acknowledges that all uses of the Missouri River system deserve equal consideration. The brief also says that the Flood Control Act of 1944 requires all river uses to be treated equally. "This is particularly important in drought years," McGrath said. "The Corps has been playing favorites for too long." (Montana Attorney General's Office Press Release, 1-17-06)

Specifically, the question addressed in the brief is: "Whether the 8th Circuit Court's decision, relying on a two-sentence dictum in *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988), which gives navigation a priority at the expense of other uses, should govern how Missouri River waters are allocated?" Montana's position is that the lower court misread the 1944 Act as giving navigation downstream priority over other uses. Further, it points out that less than 1% of the river's economic benefits come from navigation. In addition, it argues the Corps' own historic statutory interpretation of the 1944 Act and its plain language requires that the Corps "equitably balance the many uses to which the river is put."

The Missouri River flows more than 2,300 miles from its headwaters near Three Forks to St. Louis, with about 400 miles running through Montana. Fort Peck Dam in Montana is one of six mainstem dams and reservoirs in the Missouri River system managed by the Army Corps of Engineers. In recent years, drought conditions have substantially reduced water levels at Fort Peck Reservoir.

On December 1, the navigation season on the Missouri River was ended due to low water levels. This is the fourth year in a row the shipping season has been cut short. "The upper part of the Missouri basin has been in drought for seven years," according to Paul Johnston, with the U.S. Army Corps of Engineers Northwestern Division. "In order to conserve water for further use, we have shortened this year's navigation season." Ed Henleben, Ingram Barge Company, said, "This is the last thing we need because we are right in the middle of harvest season.... We can make the adjustment and we can get through it." Barges usually can hold 2,600 tons and require a 12-foot draft, but will carry lighter loads.

## States

### California

On January 31, California Department of Water Resources Director Lester Snow testified before the California Senate and Assembly on Governor Arnold Schwarzenegger's Strategic Growth Plan, as it relates to flood protection and a clean, safe, reliable water supply. In response to projected population growth and the need for a sustained investment strategy, the plan calls for a \$35 billion investment over 10 years, with \$6 billion for flood management and \$29 billion for water management. Proposed financing includes \$9 billion more in state bonds, \$5 billion from a proposed Water Resources Investment Fund (WRIF), and an anticipated \$21 billion investment from local and federal sources. Legislation to carry out the plan has been introduced as SB 1166 and AB 1839. The plan calls for the sale of Flood Protection and Water Supply Bonds in 2006 and 2010. The state flood management bond investment would be \$1 billion (2006) and \$1.5 billion (2010), leveraged with \$500,000 in local money and a \$3 billion federal cost share. Water management bonds would be \$2 billion (2006) and \$4.5 billion (2010), supplemented by \$5 billion from the WRIF, and complemented by a \$2 billion federal cost share and \$15.5 billion in local funds.

California's major water management challenge is to provide new water for urban uses due primarily to growth. The projected population by 2030 is nearly 50 million. The first priority is to maintain existing statewide and inter-regional water systems that provide a base supply. Next, the state will promote new regional solutions that reduce water demands, increase operational efficiencies and transfers, increase water supplies and improve water quality. State bonds and the WRIF will provide stable funding for statewide and regional investments, with bonds "jump starting" financing, and the WRIF providing a continuous and sustained funding stream. These funds will also be an incentive for local investments, and provide the match for federal cost sharing.

Some \$5.5 billion in state bond/WRIF money will be dedicated towards regional long-term investments that local agencies can not implement individually. The intent is to create an incentive for proactive, not just reactive investments - as well as promote regional partnerships to increase efficiency, reduce conflicts and set priorities. There would be eleven funding regions, corresponding with current integrated regional water management (IRWM) regions, within which various actions would be eligible for funding. This IRWM paradigm will involve myriad water users, purveyors,

agencies, governments, organizations and universities. The intent is to integrate diverse water-related programs that include watershed management, agricultural and urban water conservation, ground water recharge, dam rehabilitation, land use planning, water importation, reuse and recycling, desalination of brackish supplies, and system interties.

The objective of the IRWM approach is to address issues individual entities cannot resolve, promote cost effective solutions, build on local planning efforts, leverage investments in existing infrastructure, resolve conflicts between stakeholders, build working relationships and a common understanding of conditions and issues to guide ongoing planning and implementation activities, as well as integrate water management with land use, energy and other resource considerations. Director Snow's powerpoint presentations included a number of examples, including the Orange County Groundwater Replenishment System, the Santa Ana Watershed, Pajaro Valley, Sacramento area, and Kern County projects. He pointed out that under the current IRWM Proposition 50 Program grant cycle, \$150 million is available, while \$1.4 billion was requested, with 50 proposals for over 400 projects with a local cost share of more than \$2.5 billion. The program has resulted in new working relationships, covering broader geographic planning areas, with prioritization of needs after intense debate.

State financing and financial assistance pools funding to promote better state agency coordination, leverage federal money and provide a backstop for regional investments, helps develop new technologies, promotes resources stewardship and planning for emerging challenges such as climate change, as well as provides money to implement new storage proposals.

Lastly, the new Water Resources Investment Fund would be funded by a proposed "capacity charge" applied to water retailers based on the number and the type of connections. This would be a monthly charge calculated according to the following levy: \$3 per single family connection (excluding customers on lifeline billing); \$10 for multiple family connections; \$5 for each commercial connection; \$10 for industrial; \$3 for agriculture up to 10 acres; \$6 for 10-180 acres; and \$10 for over 180 acres. Of note, local suppliers would be able to decide how they wish to allocate the total charge and apportion the fee among their residential, commercial and agricultural customers.

One-half the money collected would be deposited in regional accounts for regional projects and the local match for bond funds. The other half would be deposited in a statewide account, with a minimum of 17.5% allocated to support priority regional projects, and the remaining 32.5% used to: match federal funds; fund emergency remediation of ground water contamination; fund water infrastructure of statewide significance; or fund statewide programs that promote integrated regional water management. Estimated revenue in the first year from regional capacity charge collections range from \$8 million in the Colorado River region to \$102 million in Los Angeles - Ventura, San Francisco Bay \$67 million; Santa Ana River \$48 million; San Diego \$36 million; Sacramento River \$36 million; San Joaquin \$23 million; Tulare Lake \$23 million; Central Coast \$18 million; North Coast \$10 million; and \$9 million in the Lahontan region.

### Texas

#### *Desalination*

On April 17, the Texas Water Development Board (TWDB) approved a \$1.34 million grant for a seawater desalination pilot plant study proposed by the Brownsville Public Utilities Board. The

study is the next step in the process to develop large-scale demonstration seawater desalination supplies in Texas. "Seawater is a great untapped source of supply and funding the pilot plant study in Brownsville is a vital step toward construction of a large-scale seawater desalination facility," Governor Rick Perry said. Governor Perry's vision is to use the most modern water desalination technologies to develop drought-proof water supplies from the ocean. Three sites have been under consideration given their potential to implement large-scale seawater desalination facilities: Brownsville, Corpus Christi and Freeport. "I am pleased that the Texas Water Development Board will continue to work with Corpus Christi and Freeport to maintain the viability of those projects for future seawater desalination plants," said the governor. TWDB also directed staff to continue exploring pilot plant study concepts to facilitate the development of seawater desalination projects at the Corpus Christi and Freeport sites in the near future.

"The TWDB is very pleased to provide these funds for the seawater desalination pilot plant study proposed by the Brownsville Public Utilities Board," said TWDB Chairman, E. G. Rod Pittman. "We are witnessing today how susceptible our state is to serious long-term drought conditions. The desalination of seawater will play a very significant role in meeting the future water demands in Texas." Feasibility studies completed in 2004 confirmed the technical feasibility of the proposed projects, identified potential customers and identified the financial requirements and incentives necessary to implement the projects. Based on these results, in December 2004, the TWDB recommended continuing with the seawater desalination initiative and requested an appropriation of \$2.5 million, which the 79th Texas Legislature approved, to implement pilot plant studies at the selected sites.

In general, the pilot plant study will provide data on the source water conditions and on the performance of different unit treatment processes. Ideally, after completing the pilot plant study, the board could then proceed directly to the design and construction phase. Also of note, when permitting innovative technology water supply projects, the Texas Commission on Environmental Quality (TCEQ) requires "piloting" to demonstrate the performance of the treatment process.

### Utah

The Utah State Legislature is considering legislation (HB 45) to amend the Bear River Development Act, which directs the Utah Division of Water Resources (DWR) to develop surface waters through the construction of pipelines and reservoirs. The project(s) would be owned and operated by DWR, which would also market the water by contract to Cache County, as well as the Bear River, Jordan Valley, and Weber Basin Water Conservancy Districts. The bill modifies the current construction prerequisite that there be contracts in place for the sale or lease of at least 70% of the developed water before DWR is allowed to spend any money to investigate or construct the project. The proposed changes would allow DWR to expend money expressly earmarked for preconstruction costs.

SB 27 would authorize the construction of a pipeline from Lake Powell to southwestern Utah to provide water to the St. George and Cedar City areas, as a state water project. The bill also authorizes related hydroelectric generating works, and an enterprise fund for project operation and maintenance. The Utah Board of Water Resources would be responsible for construction and water and power sales related to the project. Of note, it specifically states that the bill is not to be construed "to prevent any person, subject to other provisions of law, from developing the waters of the Colorado River." The bill creates a project management committee, and like the Bear River project, makes construction contingent on contracts for the sale of 70% of the water and obtaining

all required environmental permits. Power would be offered first to public utilities or municipalities, with related revenues designated for project repayment and operation and maintenance. Water would be made available solely to the Central Iron County, Kane and Washington County Water Conservancy Districts, which are responsible for building facilities to treat and distribute the water. The districts may take title to the project in the future subject to repayment of project costs and other requirements. The state will pay for the nonreimbursable costs allocated to recreation and fish and wildlife, with the balance allocated between municipal and industrial water uses and electricity. The repayment contract term is to be 50 years, for contracts made before completion of the project. The Board may also contract with Arizona to participate in the project to develop its water rights.

Separately, HB 47 would amend the Utah Sales and Use Tax Act to require that certain revenues be diverted to DWR's Water Resources Conservation and Development Fund and used for preconstruction costs for certain water projects - specifically Bear River development and the Lake Powell Pipeline. At present, the state imposes a sales tax of 4.75% (with additional local levies).

In 1996, the legislature modified the sales tax statute to allow 1/8% of the state levy to be used to fund water and road infrastructure projects, with half the revenue or 1/16% allocated for water projects. Still later, a \$17.5 million cap on revenue from the 1/16% levy was imposed with DWR receiving 41% or \$7.175 million a year. Further, 20.5% (of the 1/16%) would be deposited in the Utah Wastewater Loan Program Subaccount, and 20.5% in the Drinking Water Loan Program Subaccount. Another 14% (of the 1/16%) would go to the Utah Department of Natural Resources for sensitive species protection. In addition, 3% (of the 1/16%) would be deposited in the Agriculture Resource Development Fund, and another 1% is earmarked for water rights adjudications.

The bill would remove the revenue cap and allocate 94% of any excess (between \$17.5 million and the amount of revenue generated by the full 1/16% sales tax) to the Water Resources Conservation and Development Account, to be spent first for Bear River development and the Lake Powell pipeline project, which includes planning, design, engineering, legal work, permitting, acquisition of land and rights-of-way, compensation for any impairment of existing water rights, and environmental studies. The remaining 6% would go to the Division of Water Rights for hiring staff for the administration of water rights. In all, the changes would add \$5 million/year to DWR's budget and \$300,000 for the Division of Water Rights.

## **U.S. Geological Survey**

### Streamgaging

The President's overall request for streamgaging is up slightly, but program cost increases will exceed the gain. Moreover, there is a reordering of budget priorities. The FY2007 request for the U.S. Geological Survey (USGS) Cooperative Water Program (CWP) is \$62.171 million with \$2 million less for interpretive studies and an allowance of an additional \$1.338 million to cover inflation. The \$2 million cut will be accompanied by the loss of as much as \$4 million in coop-contributions, and funding for 30-40 hydrologic studies (as investigations end and new studies are not funded). WSWC members have in the past expressed their preference for funding basic streamgaging data collection, over investigative studies.

The FY2007 request includes an additional \$2.8 million for the National Streamflow Information Program (NSIP), a fully federally funded system of streamgages designed as the backbone of the national network. This additional funding represents a 20% increase, and a portion would be used to reactivate 30 critical streamgages that have been discontinued in recent years. The bulk of the money would be used to stabilize the network by fully or partially funding critical gages that might otherwise be lost due to a lack of cooperative funding from partners. Some remaining funds would be used to improve data dissemination, for quality assurance and to invest in new technologies to improve cost-effectiveness.

On March 2, Rep. George Radanovich (R-CA) chaired an oversight hearing on the FY2007 budget of the U.S. Bureau of Reclamation (and the U.S. Geological Survey water resources program). Radanovich said, "Today's hearing is about finding ways to meet the water needs of the Western States. Water is the lifeblood of our customs, our cultures, our traditions and our very way of life. Everywhere we look, there are constant reminders of water scarcity and water conflict out West. Use of the San Joaquin River in my district is one of many examples of this conflict.... Most Californians receive the benefits of Reclamation's water operations. The farm economy of the Central Valley wouldn't be what it is today without Reclamation's water projects. But, Reclamation is also at a crossroads in its history. Reclamation's infrastructure continues to age, operations and maintenance costs continue to rise, and debate continues on about Reclamation's future direction... I look forward to hearing from our witnesses, Commissioner John Keys and Matthew Larsen, about how their budgets are going to tackle the complex water resource challenges we face.

Matthew Larsen, USGS Chief Scientist for Hydrology, testified: "The FY 2007 budget for the USGS water program proposes \$204 million to continue work on issues related to water availability, water quality, and flood hazards. This budget proposal represents an increase of \$2.3 million for streamgaging activities through the National Streamflow Information Program (NSIP). This increased funding would allow USGS to reactivate 30 real-time streamgages and would allow USGS to continue operating streamgages at high-priority sites that might otherwise be lost through lack of partner funding. The 2007 budget also contains a \$200,000 increase in the NSIP program as part of a multi-hazards demonstration project focused on Southern California. Through this project, the NSIP program will add about 18 streamgages and raingages to the existing network. Sites in Southern California will also be upgraded to allow real-time transmission of soils and environmental monitoring data. The data from these additional sites will be used in flood, landslide, and debris-flow forecasting and warning."

He added, "The Cooperative Water Program, for which the budget proposes a decrease of \$2.0 million, provides for jointly funded partnerships with State, local, and tribal agencies to collect water data and conduct interpretive studies.... The proposed decrease will reduce the number of new studies that can be started in cooperation with our partner agencies, reflecting the need for fiscal prudence. A decrease of \$6.4 million eliminates USGS funding for the 54 State Water Resources Research Institutes. These Institutes generally have been successful in obtaining other sources of funding and should be able to support themselves.... The Cooperative Water Program, which funds many streamgages, but does so with requirements for matching funds from State or local agencies. More than 800 streamgaging partner agencies currently participate in the cooperative program, helping to maintain streamgages vital to long-term science and engineering work, flood warning, and river operations. The FY 2007 budget proposes a decrease of \$2.0 million for the Cooperative Water Program focused on interpretive studies that will be completed. This reduction does not affect streamgaging activities."

In August 2005, the WSWC was one of 20 organizations signing a joint letter to Interior Secretary Gale Norton and David Anderson, Associate Director, Natural Resources Programs, Office of Management and Budget (OMB), urging the Administration to request \$74 million for CWP and \$16.2 million for NSIP. The letter said this would still be well below the \$138 million contributed by cooperators annually. Further, it urged the President to consider increasing the annual request over the next few years until authorized levels and matching monies are fully funded.

On September 30, 2005, ten Senators signed a letter which read in part: "Based on an assessment of national needs, we urge the Administration to submit a budget... that increases the two primary funding components of the National Streamgaging Network by \$180 million over the next 5 years. NSIP needs to be increased from the FY2006 level of \$14 million to \$120 million in increments of at least \$20 million per year. The Cooperative Water Program needs to be increased from the FY2006 level of \$64 million to \$140 million in increments of \$15 million per year. We believe this gradual approach to meeting our long-term national needs is appropriate as well as essential to the long-term health, economic well-being, and security of our nation."

Twenty-three organizations on August 17, 2006 signed a letter to Interior Secretary Dirk Kempthorne and Rob Portman, Director of the Office of Management and Budget, urging the Administration to substantially increase its financial commitment to the National Streamflow Information Program and Cooperative Water Program. The letter states, "The USGS streamgaging programs have a proven record of providing reliable information concerning America's water resources that is essential for decision makers in both the public and private sectors for a wide variety of planning, design and management functions.... USGS internet sites providing streamflow data... are currently visited an average of one million times each day...."

Some of the organizations supporting increased funding include: the American Canoe Association, American Institute of Hydrology, American Rivers, American Society of Civil Engineers, American Water Works Association, American Whitewater Association, Association of American State Geologists, Association of State Dam Safety Officials, Association of State Floodplain Managers, Appalachian Mountain Club, Coastal States Organization, Environmental Defense, Federation of Flyfishers, Interstate Council on Water Policy, National Association of Flood and Stormwater Management Agencies, National Ground Water Association, National Water Resources Association, National Wildlife Federation, Professional Paddlesports Association, The Nature Conservancy, Trout Unlimited, and Water Environment Federation, as well as the Western States Water Council.

## RESOLUTIONS AND POLICY POSITIONS

From time to time, the Council adopts policy positions and resolutions, many of which address proposed federal laws, rules and regulations or other matters affecting the planning, conservation, development, management, and protection of western water resources. Policy positions sunset after three years, and are then reconsidered, reaffirmed, revised and readopted, or allowed to expire. The following actions were taken in 2006, during the regular Council meetings.

Position No. 274 on Protecting Ground Water Quality was reaffirmed on March 29, along with Position No. 275 in support of Indian Water Rights Settlements and Position No. 276 urging the Congress and Administration to Continue to Recognize State Primacy Regarding Water Rights and Water Quality Certification in the Federal Licensing of Hydroelectric Projects.

Position No. 277 was in the form of a letter to Carol Jorgensen, in the American Indian Environmental Office of the Environmental Protection Agency, commending the agency for its efforts in establishing the Tribal Water Program Council and expressing a hope that it would "offer an ongoing opportunity for state-tribal cooperation on issues of mutual interest."

Position No. 278 reiterates the Council's position that the transport of water through constructed conveyances to supply beneficial uses should not trigger federal National Pollutant Discharge Elimination System permit requirements and that western states have the ability to use available authorities to place appropriate conditions on water transfers to protect water quality.

Position No. 279, conveyed in the form of a letter, dated July 31, to the Honorable Ted Steven, Chairman of the Senate Commerce, Science and Transportation Committee, expressed the Council's support for legislation (S. 2751 and H.R. 5136) to create a National Integrated Drought Information System (NIDIS) within the National Oceanic and Atmospheric Administration (NOAA).

Position No. 280 was also adopted on July 21, and declared the Council's strong support for federal legislation, the National Drought Preparedness Act, to establish a national policy for drought and coordinate "proactive measures at all levels of government to plan, prepare and mitigate the serious impacts of drought."

The Council revised and readopted Position No. 281 in support of the Bureau of Reclamation's Water Conservation Field Services Program and Bridging-the-Headgate Partnership, a partnership agreement signed by public and private soil and water conservation agencies and organizations, including the Western States Water Council.

Position No. 282 regarding Federal Non-Tribal Fees in General Adjudications was also revised and reaffirmed, asking the Congress to pass legislation requiring the Federal government, when a party to a general water rights adjudication, to pay fees for costs imposed by the state to conduct the proceedings to the same extent as all other users.

Separately, the Council approved sending a letter, dated July 31 (Position No. 283), to key Congressmen and Administration officials reiterating our strong support for maintaining a thermal band as part of the Landsat Data Continuity Mission, and the necessary funding.

Lastly, Position No. 284 reiterates the Council's general support for Federal Water and Climate Data Collection and Analysis Programs, including streamgaging, snow surveys, etc.



Position No. 274  
(See also Nos. 215, 230, and 249)  
originally adopted March 14, 1997  
revised and reaffirmed Mar 14, 2000 and Mar 21, 2003

**POSITION**  
**of the**  
**WESTERN STATES WATER COUNCIL**  
**on**  
**PROTECTING GROUND WATER QUALITY**  
**Washington, D.C.**  
**March 29, 2006**  
*(reaffirmed)*

**WHEREAS**, ground water is a critically important natural resource, especially in the mostly arid West; and

**WHEREAS**, ground water management - the protection of its quality and its orderly, rational allocation and withdrawal for beneficial use - requires cooperation among all levels of government; and

**WHEREAS**, states recognize the importance and role of comprehensive ground water planning in overall water management; and

**WHEREAS**, the federal government has a longstanding policy of deferring to the states to develop and implement ground water management and protection programs; and

**WHEREAS**, most western states have legal systems to allocate ground water rights and all further have the responsibility for ground water quality protection.

**NOW THEREFORE BE IT RESOLVED** that any federal ground water quality strategy must reflect a true state-federal partnership, and provide adequate funding consistent with current federal statutory authorities.

**RESOLUTION  
of the  
WESTERN STATES WATER COUNCIL  
in support of  
INDIAN WATER RIGHTS SETTLEMENTS  
Washington, D.C.  
March 29, 2006**

**WHEREAS**, the Western States Water Council, an organization of eighteen western states, and adjunct to the Western Governors' Association has consistently supported negotiated settlement of Indian water rights disputes; and

**WHEREAS**, the public interest and sound public policy require the resolution of Indian water rights claims in a manner that is least disruptive to existing uses of water; and

**WHEREAS**, negotiated quantification of Indian water rights claims is a highly desirable process which can achieve quantifications fairly, efficiently, and with the least cost; and

**WHEREAS**, the advantages of negotiated settlements include: (I) the ability to be flexible and to tailor solutions to the unique circumstances of each situation; (ii) the ability to promote conservation and sound water management practices; and (iii) the ability to establish the basis for cooperative partnerships between Indian and non-Indian communities; and

**WHEREAS**, the successful resolution of certain claims may require "physical solutions," such as development of federal water projects and improved water delivery and application techniques; and

**WHEREAS**, the United States has developed many major water projects that compete for use of waters claimed by Indians and non-Indians, and has a responsibility to both to assist in resolving such conflicts; and

**WHEREAS**, the settlement of Native American water claims, and land claims, is one of the most important aspects of the United States' trust obligation to Native Americans and is of vital importance to the country as a whole; and

**WHEREAS**, current budgetary policy makes it difficult for the Administration, the states and the tribes to negotiate settlements knowing that the settlements may not be funded because funding must be offset by a corresponding reduction in some other tribe or essential Interior Department program.

**NOW, THEREFORE, BE IT RESOLVED**, that the Western States Water Council reiterates its support for the policy of encouraging negotiated settlements of Indian water rights disputes as the best solution to a critical problem that affects almost all of the Western States; and

**BE IT FURTHER RESOLVED**, that the Western States Water Council urges the Administration to support its stated policy in favor of Indian land and water settlements with a strong fiscal commitment for meaningful federal contributions to these settlements that recognizes the trust obligations of the United States government; and

**BE IT FURTHER RESOLVED**, that steps be taken to change current budgetary policy to ensure that any land or water settlement, once authorized by the Congress and approved by the President, will be funded without a corresponding offset to some other tribe or essential Interior Department program.

**RESOLUTION**  
**of the**  
**WESTERN STATES WATER COUNCIL**  
**urging the**  
**CONGRESS AND ADMINISTRATION**  
**TO CONTINUE TO RECOGNIZE STATE PRIMACY REGARDING**  
**WATER RIGHTS AND WATER QUALITY CERTIFICATION**  
**in the**  
**FEDERAL LICENSING OF HYDROELECTRIC PROJECTS**  
**Washington, D.C.**  
**March 29, 2006**

**WHEREAS**, water is the lifeblood of each of the arid Western States and its allocation affects the future of each Western State's economic and environmental well-being, as well as social and cultural strength; and

**WHEREAS**, each Western State has developed comprehensive systems for the appropriation, use and distribution of water for myriad uses and tailored to its unique physiographic, hydrologic and climatic conditions; and

**WHEREAS**, western states support the appropriate development of our regional hydropower resources as an important part of a balanced national energy policy; and

**WHEREAS**, hydropower development can have a profound impact on water flow regimes and other beneficial water uses; and

**WHEREAS**, Congress has consistently recognized the primacy of state law in the allocation and administration of water rights for all uses because of the need for a comprehensive system of governance; and

**WHEREAS**, Congress has also delegated its authority under the Federal Clean Water Act to the states for the protection and conservation of water quality, consistent with state water quality standards and state water rights law and administration; and

**WHEREAS**, Section 401 of the Federal Clean Water Act empowers states to certify that any federally authorized, permitted or licensed projects or other activities are consistent with applicable state water quality standards; and

**WHEREAS**, any federally licensed activity that may result in any discharge into navigable waters must be preceded by a Section 401 certification that ensures compliance with all provisions of state law; and

**WHEREAS**, states have primary jurisdiction over the integration of water quantity and water quality issues; and

**WHEREAS**, the Federal Energy Regulatory Commission (FERC) has made changes to streamline the licensing process that affect Section 401 certification requirements and other federal environmental reviews within its hydropower licensing authority under the Federal Power Act; and

**WHEREAS**, FERC recognizes the states' mandatory conditioning authority under Section 401; and

**WHEREAS**, the new FERC dispute resolution process should not affect the independent authority of state agencies with water quality certification authority to require applicants to provide needed information; and

**WHEREAS**, FERC should make the study dispute resolution process available to all state and tribal agencies that need studies to be conducted to meet their responsibilities for making recommendations under Sections 10(a) and 10(j) of the Federal Power Act; and

**WHEREAS**, FERC should provide for preparation of a single environmental document that can be used by all agencies that require preparation and circulation of environmental documentation before those agencies can issue a decision, including water quality certification; and

**NOW, THEREFORE, BE IT RESOLVED** that the Western States Water Council supports continuing efforts to integrate and streamline existing state and federal hydropower licensing requirements, while recognizing the states' mandatory conditioning authority under Clean Water Act Section 401 and Congress' longstanding deference to the states with regard to the allocation of water for all uses, including hydropower.

**BE IT FURTHER RESOLVED** that these rules provide for a dispute resolution process that is available to all state and tribal agencies that need studies to be conducted to meet their responsibilities for making recommendations under Sections 10(a) and 10(j) of the Federal Power Act, that is binding only for purposes of determining what studies FERC will require the applicant to conduct, but is not binding on states exercising their independent authority over water quality certification.

**BE IT FURTHER RESOLVED** that the Western States Water Council supports the change made by FERC in Section 5.23 of the new Integrated Licensing Process (ILP) regulations requiring that the license applicant file their request for Clean Water Act (CWA) 401 water quality certification from the State no later than 60 days following the date of issuance of the notice of acceptance and ready for environmental analysis.

**BE IT FURTHER RESOLVED** that the Western States Water Council opposes any administrative or legislative effort to weaken or eliminate states' mandatory conditioning authority under Section 401, and supports efforts to fully recognize the states' authority to allocate and regulate water uses for all purposes, including hydropower.



WESTERN STATES WATER COUNCIL

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Position #277

March 31, 2006

Carol Jorgensen  
American Indian Environmental Office  
U.S. Environmental Protection Agency  
EPA East 3334, MC-4104M  
1200 Pennsylvania Ave. NW  
Washington, D.C. 20460

Dear Ms. Jorgensen:

On behalf of the Western States Water Council, I am writing to commend EPA for its efforts in establishing the Tribal Water Program Council (TWPC). We believe the TWPC will offer Tribes an important mechanism for coordinating their environmental management programs, and we hope it will offer an ongoing opportunity for state-tribal cooperation on issues of mutual interest.

In this regard, we would suggest that the TWPC be managed by a tribal-based group. We have worked with one of the applicants, the National Tribal Environmental Council, and we believe they are a well qualified applicant. Having not reviewed the other applications, we are unable to provide any specific endorsement.

We look forward to working with EPA and the TWPC once it is established.

Sincerely,

A handwritten signature in black ink that reads 'Hal D. Simpson'.

Hal Simpson, Chair  
Western States Water Council

**RESOLUTION**  
of the  
**WESTERN STATES WATER COUNCIL**  
regarding  
**WATER TRANSFERS**  
and  
**NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM**  
**DISCHARGE PERMITS**  
**Breckenridge, Colorado**  
**July 21, 2006**

**WHEREAS**, on August 1, 2003 the Western States Water Council adopted a resolution regarding water transfers and National Pollutant Discharge Elimination System (NPDES) discharge permits; and

**WHEREAS**, in that resolution the Western States Water Council declared its position that the transport of water through constructed conveyances to supply beneficial uses should not trigger federal NPDES permit requirements, simply because the transported water contains different chemical concentrations and physical constituents; and

**WHEREAS**, in that resolution the Western States Water Council also expressed support for the ability of each Western State to use available authorities to place appropriate conditions on water transfers to protect water quality; and

**WHEREAS**, on June 7, 2006, the U.S. Environmental Protection Agency published in the Federal Register (Vol. 71, No. 109) a proposed amendment to its Clean Water Act regulations (40 CFR Part 122) to expressly exclude water transfers from regulation under the NPDES permitting program and to define water transfers as an activity that conveys waters of the United States to another water of the United States without subjecting the water to intervening industrial, municipal, or commercial use; and

**WHEREAS**, the proposed rule relies on EPA's interpretation of the federal Clean Water Act and does not limit any ability of a State to use any available authority, including authority regarding nonpoint sources of pollution, to protect the water quality of the receiving water body in a water transfer; and

**WHEREAS**, water transfers and water quality are essential to the social, economic and environmental well-being of the Western States,

**NOW, THEREFORE, BE IT RESOLVED** that the Western States Water Council generally supports EPA's proposed amendment to its Clean Water Act regulations as published in the June 7, 2006 Federal Register.

**BE IT FURTHER RESOLVED** that the Western States Water Council supports the use by a State of available authorities to protect the water quality of the receiving water body in a water transfer.

**RESOLUTION**  
of the  
**WESTERN STATES WATER COUNCIL**  
regarding  
**NATIONAL DROUGHT POLICY**  
**Breckenridge, Colorado**  
**July 21, 2006**

**WHEREAS**, much of the West is characterized by its aridity; and

**WHEREAS**, drought is a continuous threat to Western states as is evident by the extended drought conditions afflicting many parts of the West over the last decade; and

**WHEREAS**, water availability continues to circumscribe our economic and environmental well being and quality of life; and

**WHEREAS**, the Council has been actively involved in drought management and policy since 1976, when it served the Governors as a regional coordinating body for drought relief efforts and a clearinghouse for information on drought conditions; and

**WHEREAS**, Western states learned from that experience, and began developing drought response plans for the future; and

**WHEREAS**, the National Drought Mitigation Center estimates that eleven separate drought events since 1980 have caused \$147.5 billion in losses, and the federal government spends \$6 to \$8 billion annually on drought, even though a national drought policy still does not exist; and

**WHEREAS**, timely, effective government action at the federal, state, local and tribal levels to prevent or mitigate drought impacts can significantly reduce the effects of drought and the need for relief expenditures; and

**WHEREAS**, the 'National Drought Preparedness Act of 2005,' introduced in the 109<sup>th</sup> Congress by Senators Domenici and Baucus and Representatives Hastings and Rehberg, would establish a national policy for drought through the coordination of proactive measures at all levels of government to plan, prepare and mitigate the serious impacts of drought; and

**WHEREAS**, Western governors helped develop the National Drought Preparedness Act of 2005 and have called on the Congress and the President to support its enactment;

**NOW, THEREFORE, BE IT RESOLVED**, that the Western States Water Council joins the Western Governors in urging Congress and the Administration to enact this or similar legislation, which is long overdue, to establish and implement a national drought preparedness policy.

**POSITION STATEMENT**  
**of the**  
**WESTERN STATES WATER COUNCIL**  
**in support of**  
**RECLAMATION'S WATER CONSERVATION FIELD SERVICES PROGRAM**  
**AND "BRIDGING-THE-HEADGATE" PARTNERSHIPS**  
**Breckenridge, Colorado**  
**July 21, 2006**  
*(revised and readopted)*

**WHEREAS**, the Reclamation Reform Act of 1982 (RRA) directed the U.S. Bureau of Reclamation (Reclamation) to encourage water conservation on federal water projects throughout the seventeen western states, and required districts receiving water from those federal projects to develop water conservation plans; and

**WHEREAS**, in March 1996, Reclamation adopted an approach to promoting water conservation that would focus on the development of an incentive-based program of technical and financial assistance to districts in lieu of mandatory regulations and other top-down, command-and-control approaches to conservation; and

**WHEREAS**, Reclamation's Water Conservation Field Services Program (WCFSP) was established in 1997 to encourage the efficient use of water on federal water projects and, in cooperation with States and other entities, provide a non-regulatory, incentive-based approach to assisting water districts, in accordance with state law, develop and implement effective water conservation plans required by the RRA; and

**WHEREAS**, since 1997, Reclamation's 21 Area Offices have offered local programs that provide assistance and non-binding guidance to districts in four areas of emphasis: 1) water management planning; 2) conservation education; 3) demonstration of innovative conservation technologies; and, 4) implementation of effective conservation measures; and

**WHEREAS**, the WCFSP's incentive-based conceptual approach is well-received by water districts and other stakeholders at the local level as an appropriate role for Reclamation in encouraging water conservation on federal water projects and fostering improved water management on a watershed, statewide and regional basis; and

**WHEREAS**, in July 1998, as part of the program outreach under the WCFSP, Reclamation initiated a "Bridging-the-Headgate" conservation partnership with USDA-Natural Resources Conservation Service (NRCS), the National Association of State Conservation Agencies (NASCA), and the National Association of Conservation Districts (NACD), three organizations that have traditionally worked very closely together to support and encourage conservation and resource stewardship among private landowners, farmers, and water users on the "on-farm" side of the water use's headgate; and



**RESOLUTION**  
**of the**  
**WESTERN STATES WATER COUNCIL**  
**regarding**  
**FEDERAL NON-TRIBAL FEES IN GENERAL ADJUDICATIONS**  
**Breckenridge, Colorado**  
**July 21, 2006**  
(revised and reaffirmed)

**WHEREAS**, states must conduct lengthy, complicated and expensive proceedings to establish the relative rights to water in water rights adjudications; and

**WHEREAS**, Congress recognized the necessity and benefit of requiring the United States' claims to be adjudicated in these state adjudications by adoption of the McCarran Amendment; and

**WHEREAS**, those claiming and establishing their right to water, including federal agencies, are the primary beneficiaries of adjudication proceedings by having the states officially quantify and record these water rights; and

**WHEREAS**, the courts have determined that under the McCarran Amendment the United States need not pay fees for processing federal claims; and

**WHEREAS**, the federal claims are typically among the most complicated and largest of claims in state adjudications; and

**WHEREAS**, if the United States does not pay a proportionate share of the costs associated with adjudications, the burden of funding the proceedings unfairly shifts to the state and other water users and often delays completion of the adjudications by depriving the states of the resources necessary to complete them; and

**WHEREAS**, delays in completing adjudications result in inability to protect private and public property interests or determine how much unappropriated water may remain to satisfy important environmental and economic development priorities.

**NOW THEREFORE BE IT RESOLVED** that the Western States Water Council again ask the Congress to recognize that requiring states and private users to fund processing of federal, non-tribal claims in water rights adjudications unfairly shifts the burden of funding these proceedings away from the parties who derive the greatest benefit from the proceeding and effectively establishes an unfunded mandate; and

**BE IT FURTHER RESOLVED** that the Council continue urging Congress to pass legislation narrowly tailored to establish that the United States, when a party to a general adjudication shall be subject to fees and costs imposed by the state to conduct the proceedings to the same extent as all other users.



**WESTERN STATES WATER COUNCIL**

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Web Page: [www.westgov.org/wswc](http://www.westgov.org/wswc)

July 31, 2006

Dr. John H. Marburger, III  
Director, Office of Science & Technology Policy  
Executive Office of the President  
Eisenhower Executive Office Building  
Washington, DC 20502

Mr. P. Patrick Leahy, Acting Director  
U.S. Geological Survey  
12201 Sunrise Valley Drive, MS: 100  
Reston, VA 20192-0002

Dr. Michael Griffin, Administrator  
National Aeronautics & Space Administration  
Headquarters, Suite 1M32  
Washington, DC 20546-0001

The Honorable John McCain  
United States Senate  
241 Russell Senate Office Building  
Washington DC 20510

Vice Admiral Conrad C. Lautenbacher, Administrator  
National Oceanic & Atmospheric Administration  
14th & Constitution Avenue NW, Room 5128  
Washington, DC 20230

The Honorable Ralph Hall  
U.S. House of Representatives  
2405 Rayburn House Office Building  
Washington, DC 20515-4304

Dear Sirs:

On behalf of the Western States Water Council, representing the governors of eighteen western states, I am writing to reiterate our strong support for maintaining a thermal band as part of the Landsat Data Continuity Program. This information is increasingly critical for the management of western water resources, particularly agricultural water use. The current Landsat thermal band provides data vitally important to the computation of evapotranspiration and water use on a field-by-field basis. Specifically, the Surface Energy Balance Algorithm for Land (SEBAL) relies on thermal data from the Landsat satellites to compute evapotranspiration for water management uses.

The Landsat data archive holds thermal data going back to the launch of Landsat 4 in 1982. We understand that current plans call for a new Landsat satellite to back up and replace the aging and failing Landsat 5 and Landsat 7, and that a request for proposals includes a thermal band option. Given the statutory directives authorizing the data continuity mission, we strongly believe the inclusion of appropriate thermal sensors is not a discretionary option, but rather a mandatory requirement. Further, the possible reliance on foreign generated thermal data is not an acceptable long-term alternative.

As the cost of obtaining thermal imaging data has dropped, the uses to which this information has been put have increased dramatically. Currently, demonstrated water resources planning and management applications include quantifying and monitoring consumptive water use by irrigated agriculture, urban and suburban landscapes, and natural vegetation, as well as calibrating ground water models, monitoring aquifer depletion, and computing water budgets for surface water models. Further, the uniformity of irrigation water application can be monitored and crop yields estimated. It is also an

increasingly essential tool in monitoring the exercise of water rights, in order to ensure their use according to myriad state and federal laws, decrees, compacts and negotiated agreements, as well as rules and regulations.

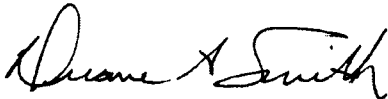
No other remote sensing capabilities available at this time, nor for the foreseeable future, can provide the band width (10.4 to 12.5 microns), high resolution (60 meters, 30 preferred), continuous coverage, workable return times (8-16 days, the shorter the better), consistency of viewing angle (maximum of 8 degrees from nadir) and time of day, coincident short-wave bands (similar to Landsat 7 with spatial resolution of 30 to 15 meters), nor the long history allowing analysis of the evolution and change in evapotranspiration. This is clearly a successful story where research has evolved into development of valuable practical applications.

Landsat thermal information has gained wide-spread use in the West. It has been used in California, Colorado, Idaho, Montana, Nevada, New Mexico, Texas, Utah, Washington and Wyoming. Its diverse uses include: (1) evaluating interstate river compact and international treaty compliance with respect to depletions from irrigation; (2) measuring ground water recharge and the impacts of pumping ground water on the water table and natural vegetation; (3) evaluating impacts on endangered species; (4) studying the impacts of land use transitions from agricultural to residential use; (5) regulation of surface and ground water use and administration of water rights; (6) determining a multi-basin water balance for planning purposes; (7) better managing irrigation practices to achieve water savings; and (8) evaluating spatial and seasonal trends in agricultural water use. More and more water-related uses of Landsat data are emerging, due in part to the drop in costs for images since 1998.

Such activities have been undertaken or proposed in the Arkansas, Bear, Boise, Upper and Lower Colorado, Lemhi, Milk, North Platte, Upper and Middle Rio Grande, Russian, Salmon, San Juan, Snake, South Platte and Yakima River Basins. This work involves federal, state and local agencies, tribes, academic interests and consulting groups.

We strongly support spending to provide for the continued availability of Landsat-comparable thermal data, and oppose any move to omit or delete the thermal band from future satellites. We hope to be able to work with you to ensure the availability of this data as we struggle to balance water uses and demands in the West.

Sincerely,



Duane A. Smith, Chairman  
Western States Water Council

**POSITION  
of the  
WESTERN STATES WATER COUNCIL  
regarding  
FEDERAL WATER AND CLIMATE DATA COLLECTION AND ANALYSIS PROGRAMS  
Adopted as Revised  
Sheridan, Wyoming  
October 6, 2006**

**WHEREAS**, the Western States Water Council is a policy advisory body representing eighteen states, and has long been involved in western water conservation, development, protection, and management issues, and the member states and political subdivisions have long been partners in cooperative federal water and climate data collection and analysis programs; and

**WHEREAS**, in the West, water is a critical, vital resource (much of which originates from mountain snows) and sound decision making demands accurate and timely data on precipitation, temperature, soil moisture, snow depth, snow water content, stream flow, and similar information; and

**WHEREAS**, the demands for water and related climate data continue to increase along with our population and this information is used by federal, state, tribal, and local government agencies, as well as private entities and individuals, to forecast flooding and drought and to project future water supplies for agricultural, municipal, and industrial uses; hydropower production, recreation, and environmental purposes, such as for fish and wildlife management and for endangered species needs; and

**WHEREAS**, without timely and accurate information, human life, health, welfare, property, and environmental and natural resources are at considerably greater risk of loss; and

**WHEREAS**, critical and vital information is gathered and disseminated through a number of important federal programs, including, but not limited to: (1) the Snow Survey and Water Supply Forecasting Program, administered by the National Water and Climate Center (NWCC) in Portland, Oregon, and funded through USDA's Natural Resources Conservation Service (NRCS); (2) NWCC's Soil and Climate Analysis Network (SCAN); (3) the U.S. Geological Survey's Cooperative Streamgaging Program and National Stream Flow Information Program, which are funded through the Department of Interior; and (4) Landsat thermal data acquired through the National Atmospheric and Space Administration (NASA) and USGS; and

**WHEREAS**, state-of-the-art technology has been developed to provide real or near real-time data with the potential to vastly improve the water-related information available to decisionmakers in natural resources and emergency management, and thus better protect the public safety, welfare and the environment; and

**WHEREAS**, over a number of years, federal appropriations have not kept up with increasing program costs and/or capital replacement needs, as well as matching non-federal contributions, and this erosion in funding has led or would have led to the discontinuance, disrepair, or obsolescence of vital equipment needed to maintain existing water resources related data gathering activities; and

**WHEREAS**, a substantial increase in related federal program appropriations is required to avoid the loss of critical information and data; and

**WHEREAS**, there is a serious need for adequate and consistent federal funding to maintain, restore, modernize, and provide for the targeted expansion of NWCC's SNOTEL and SCAN Systems, and USGS's Cooperative Streamgaging Program and National Stream Flow Information Program, with a primary focus on coordinated data collection and dissemination.

**NOW THEREFORE BE IT RESOLVED**, that the Western States Water Council urge the Administration and the Congress to give a high priority to the allocation and appropriation of sufficient funds for these critical, vital programs which benefit so many, yet have been or are being allowed to erode to the point that it threatens the quantity and quality of basic data provided to a myriad, growing and diffuse number of decision makers and stakeholders, with significantly adverse consequences.

## RULES OF ORGANIZATION

### Article I - Name

The name of this organization shall be "THE WESTERN STATES WATER COUNCIL."

### Article II - Purpose

The purpose of the Western States Water Council shall be to accomplish effective cooperation among western states in matters relating to the planning, conservation, development, management, and protection of their water resources.

### Article III - Principles

Except as otherwise provided by existing compacts, the planning of western water resources development on a regional basis will be predicated upon the following principles for protection of states of origin:

- (1) All water-related needs of the states of origin, including but not limited to irrigation, municipal and industrial water, flood control, power, navigation, recreation, water quality control, and fish and wildlife preservation and enhancement shall be considered in formulating the plan.
- (2) The rights of states to water derived from the interbasin transfers shall be subordinate to needs within the states of origin.
- (3) The cost of water development to the states of origin shall not be greater, but may be less, than would have been the case had there never been an export from those states under any such plan.

### Article IV - Functions

The functions of the Western States Water Council shall be to:

- (1) Undertake continuing review of all large-scale interstate and interbasin plans and projects for development, control or utilization of water resources in the Western States, and submit recommendations to the Governors regarding the compatibility of such projects and plans with an orderly and optimum development of water resources in the Western States.
- (2) Investigate and review water related matters of interest to the Western States.

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These rules incorporate the last changes that were adopted in November 1997 at the Council's 125th meetings in Carlsbad, New Mexico.

- (3) Express policy positions regarding proposed federal laws, rules and regulations and other matters affecting the planning, conservation, development, management, and protection of water resources in Western States.
- (4) Sponsor and encourage activities to enhance exchange of ideas and information and to promote dialogue regarding optimum management of western water resources.

(5) Authorize preparation of amicus briefs to assist western states in presenting positions on issues of common interest in cases before federal and state courts.

#### Article V - Membership

(1) The membership of the Council consists of not more than three representatives of each of the states of Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming appointed by and serving at the pleasure of the respective Governors. Member states of the Western Governors' Association, which are not members of the Council, shall be added to membership if their respective Governors so request. The Executive Committee may, upon unanimous vote, confer membership upon other western states, which are not members of the Western Governors' Association, if their respective Governor so requests.

(2) Member states may name alternate representatives.

(3) Any state may withdraw from membership upon written notice by its Governor. Further in the event any state becomes delinquent in paying dues as set forth in Article V (5) for a period of three years, the state will be excluded from Council membership unless and until the current year's dues are paid.

(4) The Executive Committee of the Council may, by unanimous vote, confer the status of Associate Member of the Council upon states it deems eligible. Associate Membership may be granted for a period of up to three years, during which time the state may appoint two official observers to participate in Council activities and receive all printed material disbursed by the Council. Associate Member states shall have no vote in Council matters. The Executive Committee shall, through regular Council voting procedures, establish the appropriate level of dues for Associate Member states. In addition to determinations concerning Associate Member states, the Executive Committee may, when appropriate, establish fees for participation in Council activities by non-members.

(5) If any state fails to pay the appropriate level of dues established by the Executive Committee of the Council, the privilege afforded by virtue of its membership to participate in Council activities and to receive all printed materials dispersed by the Council shall be withheld pending the payment of dues, beginning at the start of the fiscal year following the delinquency.

#### Article VI - Ex-Officio Members

The Governors of the member states shall be ex-officio members and shall be in addition to the regularly appointed members from each state.

#### Article VII - Officers

The officers of the Council shall be the Chair, Vice-Chair and Secretary-Treasurer. They shall be selected in the manner provided in Article VIII.

#### Article VIII - Selection of Officers

The Chair, Vice-Chair and Secretary-Treasurer, who shall be from different states, shall be elected from the Council by a majority vote at a regular meeting to be held in July of each year.

These officers shall serve one-year terms. However, the Chair and Vice-Chair may not be elected to serve more than two terms consecutively in any one office. In the event that a vacancy occurs in any of these offices, it shall be filled by an election to be held at the next quarterly Council meeting.

#### Article IX - Executive Committee

(1) Each Governor may designate one representative to serve on an Executive Committee which shall have such authority as may be conferred on it by these Rules of Organization, or by action of the Council. In the absence of such a designation by the Governor, representatives of each state shall designate one of their members to serve on the Executive Committee. Any Executive Committee member may designate an alternate to serve in his/her absence.

(2) The Council may establish other committees which shall have such authority as may be conferred upon them by action of the Council.

#### Article X - Voting

Each state represented at a meeting of the Council shall have one vote. A quorum shall consist of a majority of the member states. No external policy matter may be brought before the Council for a vote unless advance notice of such matter has been mailed to each member of the Council at least 30 days prior to a regular meeting and 10 days prior to a special meeting at which such matter is to be considered; provided, that such matters may be added to the agenda at any meeting by unanimous consent of those states represented at the meeting. In any matter put before the Council for a vote, other than election of officers, any member state may upon request obtain one automatic delay in the voting until the next meeting of the Council. Further delays in voting on such matters may be obtained only by majority vote. No recommendation may be issued or external position taken by the Council except by an affirmative vote of at least two-thirds of all member states; provided that on matters concerning out-of-basin transfers no recommendation may be issued or external position taken by the Council except by a unanimous vote of all member states. On all internal matters; however, action may be taken by a majority vote of all member states.

#### Article XI - Policy Coordination and Deactivation

With regard to external positions adopted after being added to the agenda of the meeting by unanimous consent, such external policy positions shall be communicated to the member governors of the Western Governors' Association (WGA) and the WGA Executive Director for review. If after 10 days no objection is raised by the governors, then the policy position may be distributed to appropriate parties. In extraordinary cases, these procedures may be suspended by the Executive Director of the WGA, who will consult with the appropriate WGA lead governors before doing so.

Policy positions will be deactivated three years after their adoption. The Executive Committee will review prior to each regular meeting those policy statements or positions due for sunset. If a majority of the Executive Committee members recommend that the position be readopted by the Council, then such position shall be subject to the same rules and procedures with regard to new positions that are proposed for Council adoption.

#### Article XII - Conduct of Meetings

Except as otherwise provided herein, meetings shall be conducted under Robert's Rules of



Order, Revised. A ruling by the Chair to the effect that the matter under consideration does not concern an out-of-basin transfer is an appealable ruling, and in the event an appeal is made, such ruling to be effective must be sustained by an affirmative vote of at least 2/3 of the member states.

#### Article XIII - Meetings

The Council shall hold regular meetings three times each year at times and places to be decided by the Chair, upon 30 days written notice. Special meetings may be called by a majority vote of the Executive Committee, upon 10 days written notice.

#### Article XIV - Limitations

The work of the Council shall in no way defer or delay authorization or construction of any projects now before Congress for either authorization or appropriation.

#### Article XV - Amendment

These articles may be amended at any meeting of the Council by unanimous vote of the member states represented at the meeting. The substance of the proposed amendment shall be included in the call of such meetings.